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No. __

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AYUDA, INC., *et al.*,

Petitioners,

v.

RICHARD THORNBURGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Whether the provisions of the Immigration and Nationality Act—which allow judicial review of determinations respecting legalization applications by the courts of appeals only in the context of deportation proceedings under 8 U.S.C. § 1105a—divest the district courts of general federal question jurisdiction under 28 U.S.C. § 1331, and jurisdiction of "all causes arising under the" immigration laws under 8 U.S.C. § 1329, to consider broad-based statutory and constitutional challenges to restrictive INS policies regarding legalization claims.

Whether an agency action is final and ripe for review, under this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), when that action consists of a regulation and agency policy statements, and when further refinements of the agency's regulation and policy cannot occur prior to the lapse of a statutory deadline.

PARTIES TO THE PROCEEDING

The parties in this Court are as follows:

Petitioners: Ayuda, Inc., the Ethiopian Community Center, Inc., Latin American Youth Center, Mexican American Legal Defense and Educational Fund, N.K. Doe, J.H. Doe, T.B. Doe, K.A.A. Doe and J.N.U. Doe.[1]

Respondents: Richard Thornburgh, individually, and as Attorney General of the United States, Gene McNary, individually, and as the Commissioner of the Immigration and Naturalization Service, and the Immigration and Naturalization Service.

In the court from whose judgment review is sought, Petitioners were Appellees and Respondents were Appellants. In the trial court, Petitioners were Plaintiffs and Respondents were Defendants.

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[1] This lawsuit was brought originally, in part, as a class action. The individually named "Doe" plaintiffs brought the action on behalf of themselves and others similarly situated asserting that they were entitled to legalization pursuant to 8 U.S.C. § 1255(a), but that they would be denied such legalization because of the restrictive regulations interpreting the term "known to the Government" set forth in 8 C.F.R. § 245a.1(d). *See* original Complaint for Injunctive and Declaratory Relief, March 8, 1988.

The United States District Court for the District of Columbia found that the organizational plaintiffs had standing to challenge the INS regulation, and therefore it found it did not need to decide the standing of the individual plaintiffs, nor did it need to certify the class. On September 2, 1988, plaintiffs before the district court sought to amend the Complaint for Injunctive and Declaratory Relief to add as individual plaintiffs certain aliens who had been or would be denied legalization benefits because their claims were based upon section 265 violations. At this time, plaintiffs before the district court also moved for class certification. Both motions remain pending before the district court.

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ayuda, Inc., et al., respectfully pray that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on July 18, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Ayuda, Inc. v. Thornburgh* is reported at 880 F.2d 1325 (D.C. Cir. 1989), and is reprinted in the Appendix to this Petition ("App.") p. 1a. The denial by the United States Court of Appeals for the District of Columbia Circuit of the Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* is reprinted in the Appendix, App. p. 197a. The opinion of the United States Court of Appeals for the District of Colum-

bia Circuit denying Respondents' Petition for a Writ of Mandamus in *In Re Thornburgh* is reported at 869 F.2d 1503 (D.C. Cir. 1989), App. p. 166a. The opinion of the United States District Court for the District of Columbia is reported at 687 F.Supp. 650 (D.D.C. 1988), App. p. 88a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Court of Appeals was denied on October 4, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations involved in this proceeding are printed in the Appendix. They are: Immigration and Nationality Act ("INA") Sections 106, App. p. 214a; 245A(a)(2), App. p. 219a; 245A(f), App. p. 220a; and 279, App. p. 222a, (8 U.S.C. §§ 1105a, 1255a(a)(2), 1255a(f), and 1329 (1988), respectively); 28 U.S.C. § 1331 (1988), App. p. 223a; former Section 265 of the INA, 8 U.S.C. § 1305 (1976), App. p. 224a; and 8 C.F.R. §§ 245a.1(d) and 245a.2(b)(3) (1987), App. p. 225a.

STATEMENT OF THE CASE

This Petition challenges the decision of the United States Court of Appeals for the District of Columbia Circuit vacating an order of the United States District Court for the District of Columbia. The district court's order enjoined the Immigration & Naturalization Service ("INS") from denying legalization to certain nonimmigrants who failed to meet the reporting requirements of former INA § 265, 8 U.S.C. § 1305, (hereinafter "§ 265") if the INS determined that such aliens credibly established a willful

violation of § 265 and otherwise met the applicable conditions for legalization.

The D.C. Circuit held that the district court was without jurisdiction to hear the challenge to INS's regulations and policies which had resulted in the order. Of the nine federal courts around the nation which have ruled on challenges to the INS's implementation of the legalization provisions of the Immigration Reform and Control Act of 1986 ("IRCA"), the D.C. Circuit was the only court to find that there was no federal question jurisdiction in the district courts. Moreover, the decision of the court of appeals throws into chaos over twenty years of jurisprudence, established by decisions from this Court and other federal courts, firmly upholding district court federal question jurisdiction under 28 U.S.C. § 1331, and 8 U.S.C. § 1329 of causes arising under the U.S. immigration laws, not within the context of a final order of deportation or exclusion. Finally, the holding of the court of appeals runs roughshod over what has become a black-letter principle of administrative law—the presumption in favor of judicial reviewability of agency actions.

The greatest irony of this case is that the focus of the Court of Appeals' decision was perhaps the most compassionate immigration statute ever enacted. Congress created the "legalization" provisions of IRCA in order to grant legal status to a large subclass of aliens living in the U.S. unlawfully. In order to maximize participation in the legalization program, Congress required the INS to "incorporate flexibility into the standards for legalization eligibility . . . taking into consideration the special circumstances relating to persons previously living clandestinely." H. Rep. No. 682, 99th Cong., 2d Sess. 93 (1986). Congress ordered the INS to implement legalization in a "liberal and generous fashion" so that "millions" of aliens living in the U.S. illegally since 1982 would "emerge from the shadows" to make legalization a success. 132 Cong. Rec. H. 9709 (Oct. 9, 1986) (Statement of Rep. Rodino).

Instead of implementing the legalization program in this generous spirit, the INS drew narrow eligibility guidelines which effectively crippled the ability of thousands of aliens to seek the benefits of the new law. It is one such narrow restriction of a legislatively-established guideline which is the subject of this case.

The *Ayuda* suit was instituted in the district court on March 8, 1988, by four immigration counseling organizations, including two Qualified Designated Entities ("QDEs"),[1] and, as a class action, by five aliens, individually, and on behalf of a class of others similarly situated. The case involved the "known to the Government" provision of 8 U.S.C. § 1255a(a)(2)(B). 8 U.S.C. § 1255a(a)(2)(B) provides that applicants who are "nonimmigrants" (*i.e.*, persons who entered the United States lawfully prior to 1982 for a temporary period) must have violated restrictions on their nonimmigrant status as of January 1, 1982, and must establish that their resultant "unlawful status was known to the Government as of [January 1, 1982]."

Despite the plain statutory language and Congress' generous motives, the INS issued regulations in May 1987 that narrowly defined "known to the Government" to require the alien's presence to have been "known to the INS" prior to January 1, 1982. 52 Fed. Reg. 16206 (1987); 8 C.F.R. § 245a.1(d) (1987). On September 22, 1987, the United States District Court for the Northern District of Texas, on a Motion for a Writ of Habeas Corpus, held that the INS's regulations regarding the term "known to

[1] A Qualified Designated Entity is a non-profit organization, such as Petitioners Ayuda, Inc. and the Ethiopian Community Center, that contracts, *inter alia*, to receive and screen legalization applications pursuant to the Immigration Reform and Control Act of 1986, and to provide assistance and information to aliens seeking legalization benefits. The designation of these organizations to assume such a role derives from a Congressional grant of special status in the Immigration Reform and Control Act of 1986. *See* 8 U.S.C. § 1255a(c). *Ayuda v. Meese*, 687 F.Supp. at 655-658 and n. 4.

the Government" were inconsistent with IRCA and outside the scope of the INS's authority. *Farzad v. Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987). The INS ignored this district court's holding and continued to use the May 1987 regulation without modification. Plaintiffs therefore filed this action.[2]

On March 30, 1988, the District Court for the District of Columbia rejected the INS's definition of the phrase "known to the Government" as violative of the "crystal clear" statutory language, as well as the "broad remedial purpose" of the statute. *Ayuda v. Meese*, 687 F. Supp. at 661-63.[3] The district court declared the INS's regulation to be contrary to law. *Id.* at 666.[4]

On April 21, 1988, a Motion to Intervene as Plaintiffs, with a Proposed Complaint, was filed by an additional group of immigration counseling organizations ("Proposed Intervenors"). Proposed Intervenors asserted that aliens who had failed to file annual or quarterly registration reports with the INS, pursuant to INA § 265, were eligible for legalization under the district court's interpretation of "known to the Government," because their violation, which

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[2] The first count of the Complaint asserted that the INS regulation at 8 C.F.R. § 245a.1(d) violated the statutory terms of 8 U.S.C. § 1255a(a)(2)(B), and was arbitrary, capricious, and in excess of statutory authority under the A.P.A. The second count asserted a constitutional claim—that the regulation, and the INS's policies and practices pursuant to that regulation, violated the Fifth Amendment to the United States Constitution.

[3] Because the district court found the regulation to be inconsistent with IRCA and thus outside the scope of the INS's authority, the court necessarily did not reach the issue of whether the regulation and the practices and procedures of the INS violated the Constitution.

[4] The Defendants in the district court later chose not to appeal the district court's March 30, 1988, ruling, and the first three Supplemental Orders entered in the case. *See* "Defendant's Opposition to Plaintiffs' Motion for Entry of Supplemental Order VIII" filed May 17, 1988, at page 9.

constituted a deportable offense, made their unlawful status "known to the Government".[5] As the district court wished to minimize the number of parties, Plaintiffs incorporated as their own the arguments and evidence presented by the Proposed Intervenors.[6] The evidence[7] documented the great amount of confusion present among QDEs nationwide because of the INS's refusal to consider a § 265 violation "known to the Government".

On May 2, 1988—two days prior to the May 4, 1988, filing deadline for legalization applications—the district court entered Supplemental Order V which provided *inter alia*,

> that INS shall be enjoined from denying legalization to nonimmigrant aliens who contend that they violated their nonimmigrant status prior to January 1, 1982 by failing to comply with the

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[5] Prior to January 1, 1982, there were three distinct reporting requirements for nonimmigrants under § 265: an annual report every January on Form I-53, a report every 90 days on Form AR-11, and a report within ten days of every address change on Form AR-11. *See* 8 U.S.C. § 1305 (1976). Therefore, Proposed Intervenors contended, as of January 1, 1982, the INS was able to determine by the nonexistence of these reports which aliens were in an unlawful status for failure to comply with the address reporting requirements of § 265, because INS had records for all nonimmigrants showing their admission.

[6] *See* "Plaintiff's Motion to Admit Additional Co-Counsel" filed on April 28, 1988, at 1. The Motion was granted by the district court on the same day as it was filed. *See also* note 1 to "Plaintiffs' Memorandum in Reply to Defendants' Opposition to Intervenors' Motion to Compel Compliance and/or Modify Permanent Injunctions," filed on May 2, 1988.

[7] Along with the Motion to Admit Additional Co-Counsel, on April 28, 1988, Plaintiffs filed fifteen affidavits from individuals and QDEs, many of which discussed the § 265 theory of eligibility for legalization. *See* "Notice of Evidence of Defendants' Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline." Further affidavits and declarations were filed the next day, on April 29, 1988.

> mandatory quarterly or annual registration requirements of [§ 265], if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization. . . .

Ayuda v. Meese, 687 F.Supp. at 668.

On July 5, 1988, Respondents filed a Notice of Appeal, appealing from certain parts of Supplemental Order V, as well as parts of Supplemental Orders IV and VII. On December 1, 1988, Respondents filed a Motion for Partial Withdrawal of their pending appeal,[8] which Motion was granted by the court of appeals on December 16, 1988.[9]

Following argument on the appeal of Supplemental Order V, a panel of the D.C. Circuit, in a 2-1 decision, va-

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[8] Respondents sought to withdraw those portions of their appeal which dealt with Supplemental Orders IV and VII.

[9] On September 2, 1988, Plaintiffs filed in the district court a Motion for Leave to Amend Complaint to add new individual Plaintiffs as representatives of the class, to redefine Plaintiffs' class to include, *inter alia*, those persons who failed to file annual and quarterly reports pursuant to § 265 and for class certification. The district court decided to hold these motions in abeyance and both are still pending to this day.

In addition, on November 18, 1988, Respondents filed a Petition for Writ of Mandamus in the court of appeals covering Supplemental orders XI and XII, which established a Special Master procedure for certain aliens who failed to file legalization applications on or before May 4, 1988. These aliens include the non-registrant aliens who did not receive notice of the May 2 Supplemental Order V in time to file their legalization applications on or before the May 4, 1988 deadline. Following argument, a panel of the D.C. Circuit, in a unanimous opinion issued on March 3, 1989, refused to grant the writ of mandamus, holding that the case "in its present posture does not clearly fail to present a case or controversy, and the district court's continued exercise of jurisdiction does not violate the judicial review provisions of the IRCA." *In Re Thornburgh*, 869 F.2d 1503, 1517 (D.C. Cir. 1989).

cated the district court's order. Circuit Judge Silberman, writing for the majority ("the *Ayuda* majority"), found that the judicial review provisions of the legalization program precluded district court review. The majority also held that the INS's policy on the § 265 theory was not ripe for review, notwithstanding an INS regulation and other policy statements which precluded § 265 claims.[10] Chief Judge Wald filed a dissent in which she stated that neither the judicial review provisions of IRCA, nor the ripeness or standing doctrines precluded the district court's exercise of federal question jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 to invalidate INS legalization rules. *Id.* at 1366.

On September 1, 1989, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the court of appeals. On October 4, the panel, by a 2-1 vote, denied the Petition for Rehearing. At the same time, the full court of appeals issued an Order stating that a majority of the judges of the court in regular active service had not voted in favor of the Suggestion for Rehearing *En Banc*.[11]

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[10] Though the court did not specifically address the Plaintiffs' additional claim that the INS practices and procedures violated the Fifth Amendment to the United States Constitution, it inferentially dismissed that claim by concluding that the district court lacked all jurisdiction to consider and issue Supplemental Order V.

[11] Four separate opinions were issued on this vote. Four of the nine active judges voted to rehear the case *en banc*. In addition, however, Circuit Judge Buckley stated that due to his own views on the issues in the case, he concurred in the denial of rehearing, because to do otherwise would "raise false hopes among the appellees while denying them the opportunity for prompt review by the Supreme Court."

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT IN AYUDA V. THORNBURGH ON THE JURISDICTION OF THE DISTRICT COURTS TO ENTERTAIN CHALLENGES TO INS RULES DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS, CONTRAVENES A PREVIOUS DECISION OF THIS COURT, AND RUNS COUNTER TO ESTABLISHED AND PREVAILING PRINCIPLES OF LAW AS SET FORTH IN OTHER FEDERAL COURT DECISIONS AROUND THE COUNTRY.

A. A CLEAR CONFLICT EXISTS BETWEEN THE D.C. AND ELEVENTH CIRCUITS OVER THE QUESTION OF WHETHER THE DISTRICT COURTS HAVE JURISDICTION TO HEAR CHALLENGES TO INS REGULATIONS AND GUIDELINES UNDER IRCA

The *Ayuda* majority ruled that a district court challenge to an INS regulation was an action seeking "judicial review of a determination respecting an application for adjustment of status." Since, according to the majority, Congress intended judicial review of such applications to be solely in the courts of appeal following the issuance of an order of deportation in an individual case, the district courts were without jurisdiction to hear challenges to INS regulations, policies or procedures.

The statute which was the basis for the majority's ruling is 8 U.S.C. § 1255a(f). That statute applies, by its terms, only to "review of *a* determination respecting *an* application" for legalization (emphasis added). Under this provision, an individual whose application for legalization has been denied by the INS may obtain administrative review of this denial by appealing to a single level of appellate review created for legalization appeals. 8 U.S.C. § 1255a(f)(3)(A). That review is to be based "solely upon the administrative record established at the time of *the determination on the application*", 8 U.S.C. § 1255a(f)(3)(B) (emphasis added). IRCA's legalization provisions tie *judi-*

cial review of a decision on a legalization application to a statutory provision which has been in existence since 1961, 8 U.S.C. § 1105a(a), which allows for judicial review of final orders of deportation in the courts of appeal.

According to the *Ayuda* majority, an INS-promulgated regulation constitutes "*a* determination respecting *an application*" because such regulations "embod[y] determinations that will impact" future applications. 880 F.2d at 1331 (emphasis added). Thus, in the majority's view, 8 U.S.C. § 1255a(f) precludes district courts, even under their federal question jurisdiction, 28 U.S.C. § 1331(a), and their jurisdiction over all cases arising under the immigration laws, 8 U.S.C. § 1329, from entertaining a statutory or constitutional challenge to regulations. Because the majority finds that 8 U.S.C. § 1255a(f) precludes judicial review of agency action, and that such action is committed to agency discretion by law, the majority's analysis also divests district courts of jurisdiction over claims under the Administrative Procedure Act ("APA").[12]

This restrictive view of the jurisdiction of the district courts directly conflicts with the 11th Circuit's jurisdictional analysis in *Haitian Refugee Center v. Nelson*

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[12] Under the majority's jurisdictional analysis, the INS could publish a regulation, or institute a policy, interpreting IRCA to apply only to white (or male, or European) aliens and be immune from any judicial review unless or until an individual alien: (1) who had spent the time and money to apply for legalization benefits despite the regulations disqualifying him or her had received a denial of a legalization application; (2) either then voluntarily placed him or herself in deportation proceedings or later found him or herself arrested and taken into custody by the INS; (3) was in fact placed in deportation proceedings; (4) lost the deportation hearing; (5) appealed to the Board of Immigration Appeals; (6) lost the appeal before the Board; and then (7) appealed a final order of deportation to the court of appeals. Indeed, even if the alien progressed as far as the court of appeals, that court would only have before it the agency's construction of the law "as applied to the particular applicant." *See* 880 F.2d. at 1333 n.9.

("*HRC*"), 872 F.2d 1555 (11th Cir. 1989),[13] of the identical statutory language. In *HRC*, two organizations and seventeen individual applicants for amnesty under the "Special Agricultural Worker" ("SAW") legalization provisions of IRCA[14] challenged, in district court, the INS's practices and policies in administering the program.[15] The District Court for the Southern District of Florida found jurisdiction to consider the challenge, notwithstanding the judicial review provisions of 8 U.S.C. § 1160(e)(1).[16]

In affirming the decision of the district court, the 11th Circuit found that district court jurisdiction over regula-

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[13] Neither the *Ayuda* panel majority, nor any of the statements issued denying the petition for rehearing *en banc*, addressed the decision of the 11th Circuit, even though that Circuit's ruling was issued in May of 1989, approximately two months before the D.C. Circuit panel decision in *Ayuda*.

[14] *See* 8 U.S.C. §§ 1160(a)(1)(A) and (B). As with IRCA's legalization program, the SAW program offered "amnesty" to certain aliens.

[15] The challenges asserted, *inter alia*, imposition of an unlawful burden of proof, the denial of meritorious applications for SAW status, the issuance of denial notices which failed to specify reasons for denial, and imposition of an interview procedure violative of the Fifth Amendment right to Due Process.

[16] 8 U.S.C. § 1160(e)(1), provides that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this Section except in accordance with this subsection." The Attorney General is directed to "establish an appellate authority to provide for a single level of administrative review of such a determination," 8 U.S.C. § 1160(e)(2)(A), and [t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. §1160(e)(3)(A). That judicial review "shall be based solely upon the administrative record" and the "determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. § 1160(e)(3)(B). *These provisions are indistinguishable from the provisions of 8 U.S.C. § 1255a(f). See* the *Ayuda* majority's discussion of the provisions of Section 1255a(f) at 880 F.2d 1329.

tory challenges concerning a large group of aliens is fully consistent with the aim of Congress in passing 8 U.S.C. §1105a:

> In *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), we concluded that because plaintiffs' complaint, which challenged the INS's accelerated procedures for processing asylum requests, addressed "matters alleged to be part of a pattern or practice by immigration officials to violate the constitutional rights of a class of aliens", plaintiffs' claims were independently cognizable in the district court under its federal question jurisdiction." *Id.* at 1033. In *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (in banc), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), we reaffirmed that Section 106 of the INA (codified at 8 U.S.C. § 1105a) does not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials. *Jean*, 727 F.2d at 980. We explained that to postpone "judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has an opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a. *Id.* In this action, appellees do not challenge the merits of any individual determination, rather, like the plaintiffs in *Haitian Refugee Center v. Smith*, and *Jean v. Nelson*, they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights.

872 F.2d at 1560 [footnotes omitted].

The holding of the 11th Circuit in *HRC v. Nelson* is diametrically opposed to that of the D.C. Circuit in *Ayuda*. The 11th Circuit in *HRC* found that a challenge to INS

procedures and practices does not constitute "a review of a determination respecting an application for adjustment of status" under 8 U.S.C. § 1160(e)(1). 872 F.2d at 1560. The D.C. Circuit in *Ayuda* found that such a challenge does constitute "a review of a determination respecting an application for adjustment of status" under 8 U.S.C. § 1255a(f)(1). 880 F.2d at 1331. The 11th Circuit in *HRC* found that 8 U.S.C. § 1105a(a) did not bar federal question lawsuits by organizations and individuals alleging deprivation of statutory and constitutional rights under INS practices and policies. 872 F.2d at 1560. The D.C. Circuit in *Ayuda* found that it did. 880 F.2d at 1335. The conflict between the circuits thus could not be clearer, and petitioners urge that this Court grant their Petition for a Writ of *Certiorari* in order to resolve it.

B. THE D.C. CIRCUIT'S DECISION IN AYUDA CONFLICTS WITH THE HOLDING AND RESULT OF A DECISION OF THIS COURT

In *Jean v. Nelson*, 472 U.S. 846 (1984), this Court affirmed an *en banc* ruling of the 11th Circuit, and sent back to the district court for decision a challenge to an INS policy of detaining certain aliens pending disposition of asylum claims. The plaintiffs in *Jean* consisted of named representatives of a class of undocumented aliens from Haiti who allegedly had been denied parole. The *Jean* plaintiffs claimed that a new immigration policy was unlawful because it did not comply with the notice-and-comment rulemaking procedures of the APA, and that the policy was being enforced against the Haitians in violation of the Fifth Amendment. 472 U.S. at 849.

The district court in *Jean* was faced with a jurisdiction statute similar to that in *Ayuda* and *HRC*. In *Jean*, the statutory provision was 8 U.S.C. § 1105a(b).[17] Like its al-

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[17] 8 U.S.C. § 1105a(b), provides:

(b) Notwithstanding the provisions of any other law, an alien

legations in *Ayuda* and *HRC*—that court of appeals' review of final orders of deportation under § 1105a(a) precluded district court federal question jurisdiction—the INS asserted in *Jean* that § 1105a(b) provided for review of final exclusion orders only in habeas corpus proceedings and therefore the district court did not have federal question jurisdiction over challenges to INS rules. *Louis v. Meissner*, 532 F. Supp. 881, 885 (S.D. Fla. 1982).

The *Jean* district court agreed with the INS, concluding that Section 1105a(b) was indeed a bar, and found that it was without subject matter jurisdiction to hear all claims which might "merge" into a final order of exclusion. *Id.* at 885-889. The 11th Circuit reversed. Both the panel and *en banc* circuit court opinions extensively reviewed the jurisdictional bases for the suit and both held that Section 1105a(b) *did not prohibit* class action lawsuits challenging INS regulations or procedures. *See Jean v. Nelson*, 711 F.2d 1455, 1502-05 (11th Cir. 1983) and *Jean v. Nelson*, 727 F.2d 957, 979-981 (11th Cir. 1984) (*en banc*). As the *en banc* court stated:

> In this case, plaintiffs' claim could be heard by the district court pursuant to its jurisdiction under 28 U.S.C. § 1331, since petitioners are seeking a determination [under] the Refugee Act of 1980 and its accompanying regulations .... Because plaintiffs' complaint raises the issue whether the agency has acted in accord with the statutory mandate of Congress, as well as its own regulations and procedures, the district court can sustain jurisdiction over this claim ....

Jean v. Nelson, 727 F.2d at 980 n.32. Accordingly, the court remanded the case to the district court.

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against whom a final order of exclusion has been made heretofore or hereafter ... may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

This Court affirmed and, in an opinion written by the Chief Justice, agreed that the case should be remanded "to the District Court for consideration of petitioner's claims based on the statute and regulations." *Jean v. Nelson*, 472 U.S. at 857. While this Court's opinion did not specifically address the question of the jurisdictional limitations of 8 U.S.C. § 1105a, by its ultimate conclusion, the Court clearly agreed with the 11th Circuit that the district court did have jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 to consider challenges to INS regulations and procedures not brought within the context of deportation or exclusion proceedings.

The *Ayuda* majority states that this Court "express[ed] no view on jurisdictional issues" in *Jean v. Nelson*. *Ayuda v. Thornburgh*, 880 F.2d at 1335, 1336. However, these statements ignore the fact that this Court *affirmed* the 11th Circuit's *remand* of the case *to the district court*, and did so against a background of *three* lower court decisions which extensively discussed the limitations of 8 U.S.C. § 1105a(b). The D.C. Circuit's decision therefore conflicts with the holding and result of this Court's ruling in *Jean*, and Petitioners accordingly urge the Court to grant their Petition for a Writ of *Certiorari*.

C. THE D.C. CIRCUIT'S DECISION IN AYUDA CONFLICTS WITH ESTABLISHED AND PREVAILING PRINCIPLES OF IMMIGRATION JURISDICTIONAL LAW AS SET FORTH IN OTHER FEDERAL COURT DECISIONS AROUND THE COUNTRY

Every federal court to review the specific jurisdictional issue involved in this case, with the exception of the D.C. Circuit, has confirmed that district courts do indeed have jurisdiction to review challenges to the INS's implementation of the legalization provisions of IRCA under 28 U.S.C. § 1331 and 8 U.S.C. §1329. In addition to *Haitian Refugee Center, Inc. v. Nelson*, *supra*, previously discussed, these cases include *Vargas v. Nelson*, 682 F. Supp. 591, 597-98 (D.D.C. 1987); *Doe v. Nelson*, 703 F. Supp. 713,

720-22 (N.D. Ill. 1988); *Immigration Assistance Project v. INS*, 709 F. Supp. 998 (W.D. Wash. 1989), *appeal pending*; *Zambrano v. INS*, CV No. S-88-455 EJD (E.D. Cal. 1988); *appeal pending*; *Catholic Social Services v. Thornburgh*, No. CV-86-1343-LKK (E.D. Cal. 1988), *appeal pending* No. 88-15046; *League of United Latin American Citizens v. INS*, No. CV 87-04757 WDK (C.D. Cal. 1988), *appeal pending* No. 88-15046; as well as the district court ruling in *Ayuda*. In each of these cases, the court rejected the INS's argument that IRCA requires exclusive review of INS rules in the court of appeals following orders of deportation.

The *Ayuda* majority likewise stands alone among the federal courts because its restrictive reading of 8 U.S.C. § 1105a brings into question a long line of federal court cases which firmly establish federal question jurisdiction of district courts over challenges to INS policy and rule-making. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032-33 (5th Cir. 1982) and its progeny, *Jean v. Nelson*, *supra*, *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488, 1503 (C.D. Cal. 1988); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D. Cal. 1982).[18]

Rather than confronting and distinguishing the legal analysis in these cases, however, the majority dismisses them in a wholesale fashion, characterizing them as "a gaping hole in the INS's defensive line." *Id.* at 1336. By this, the majority implies that the INS is immune from all judicial review of its regulatory actions, policies and practices. As the cases above demonstrate, this result is contrary to the firmly established principle of immigration law that district courts *do* have jurisdiction under 28 U.S.C.

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[18] *See also Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *NCIR, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vacated on other grounds*, 107 S.Ct. 1881 (1987), *on remand*, No. CV-83-7297 (C.D. Cal. 1987).

§1331 and 8 U.S.C. §1329 to review challenges to INS policies and procedures.

Moreover, the majority's implication that *HRC v. Smith* was the first of these "gaping hole[s] in the INS's defensive line" is mistaken. There are, in fact, over twenty years of judicial authority supporting the jurisdiction of the district courts to consider challenges to general INS rulemaking and policies, as well as appeals of certain administrative orders and discretionary decisions not made within the context of final orders of deportation.

Certainly a major "gaping hole" was this Court's decision in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). In *Kwok*, this Court reviewed 8 U.S.C. § 1105a and held that this statutory provision "vest[s] in the courts of appeal exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of [the] section . . . are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." 392 U.S. at 209-210.[19] *See Jaa v. U.S.*, 779 F.2d 569, 571 (9th Cir. 1986); *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C.) *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. den.* 446 U.S.

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[19] The *Ayuda* majority attempts to overcome the reasoning of *Kwok* by citing to the two more recent cases of *Foti v. INS*, 375 U.S. 217 (1963) and *INS v. Chadha*, 462 U.S. 919 (1983). The aliens in both *Foti* and *Chadha*, however, were seeking court of appeals review after being subject to outstanding final orders of deportation. *Foti*, 375 U.S. at 219n.1, *Chadha*, 462 U.S. at 928. Thus both *Foti* and *Chadha* involved judicial review of a specific "final order[] of deportation" under 8 U.S.C. § 1105a(a). This Court held that an alien *who is subject to a final order of deportation* can challenge all matters on which the validity *of that final order* is contingent in his or her appeal of the order under 1105a—the other matters being 'included" or "encompassed" with the term of the "final order[]." However, this is quite different from saying, as the *Ayuda* majority does, that under no circumstances can the legality or the constitutionality of INS regulations or policies be directly challenged outside the § 1105a procedure where no final order of deportation exists.

957 (1980); *Andres v. INS*, 460 F.2d. 287 (6th Cir. 1972); *Butterfield v. INS*, 409 F.2d. 170, 173-74 (D.C. Cir. 1969). *See also Tai Mui v. Esperdy*, 371 F.2d 772 (2nd Cir. 1966), *cert. denied* 386 U.S. 1017 (1967).

Because the *Ayuda* majority's decision is at odds with this entire body of jurisprudence, it undermines established and prevailing principles of immigration jurisdictional law. Petitioners therefore urge that this Court settle the conflict among the federal courts over this important question of federal law.

II. THE D.C. CIRCUIT'S READING OF 8 U.S.C. §§ 1255a(f) AND 1105a COMPLETELY UNDERMINES THE PRESUMPTION OF JUDICIAL REVIEWABILITY BY DISTORTING THE PLAIN MEANING OF THE STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF IRCA

It is fundamental that, in the absence of a clear indication that Congress intends to restrict judicial reviewability of agency action, such reviewability is to be presumed and that this may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967). Such evidence must be " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.' " *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 673 (1986). *Accord Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988). *See also Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Rusk v. Cort*, 369 U.S. 367 (1962). Yet the *Ayuda* majority turns the presumption of judicial reviewability on its head, by commencing with a presumption *against* the reviewability of INS actions concerning IRCA and distorting statutory language and legislative history to support its premise.

Even before embarking upon its statutory construction analysis, the *Ayuda* majority decides what Congress "must have meant", reasoning that Congress could not have intended "to channel to the courts of appeals only the application of the statute in presumably less important individual cases while reserving to initial district court review (albeit subject to subsequent appeal) the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens." 880 F.2d at 1331. The majority then strains the statutory language to fit this imputed intent.

In order to make the statutory language encompass INS rulemaking as well as determinations on individual applications, the *Ayuda* majority centers its reading of 8 U.S.C. § 1255a(f)(1) upon the word "respecting," interpreting it to mean anything having any relation to, or impact upon legalization applications, or indeed, the legalization program as a whole. 880 F.2d at 1331. In so doing, the court effectively reads the words "an application" out of existence.

Yet, "[the] ordinary and obvious meaning of [a] phrase is not to be lightly discounted." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1986). The word "application" clearly refers to a written document or form with which an alien applies for legalization. As Chief Judge Wald points out in her dissent, "other provisions of IRCA inform us that an 'application[ ] for adjustment of status' is a concrete piece of paper that 'may be filed' with various entities, 8 U.S.C. § 1255a(c)(1), may be 'forward[ed]' by those entities to the Attorney General, *id.* § 1255a(c)(3), and must 'contain' certain information. *Id.* § 1255a(a)(1)(C)." 880 F.2d. at 1349. The majority's interpretation of the word "respecting," however, necessitates a far broader interpretation of the words "an application" than the ordinary language permits. Indeed, the majority contends that "an application" encompasses future applications or consolidated applications. 880 F.2d at 1331. This inference is

simply not fairly derived from the plain meaning of the words.[20]

Moreover, the majority's assertion that the term "determination *respecting* an application" is all-encompassing ignores the use of the word "denial" *in that same subsection of the Act* providing for judicial review under 8 U.S.C. § 1105a:

> There shall be judicial review of *such a denial* only in the judicial review of an order of deportation under Section 1105a of this title.

8 U.S.C. § 1255a(f)(4) (emphasis added). The subsequent reference to "a denial" makes clear that what is meant is a final determination of an individual application, *not* the "determination" of the Attorney General as to the content of INS regulations or policy.[21]

The *Ayuda* majority's jurisdictional scheme essentially substitutes 8 U.S.C. § 1255a(f) and 8 U.S.C. § 1105a for

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[20] As the dissent notes, the entire subsection dealing with administrative and judicial review makes clear that Congress used the phrase "a determination respecting an application" as a phrase encompassing any and all aspects of an *individual's* petition, not any and all aspects of the IRCA regulatory process. *See* 880 F.2d at 1350 and n.2 (Wald, C.J., dissenting).

[21] The majority analogizes its interpretation of the term "determination respecting an application" to this Court's construction of the term "any claim arising under" the Medicare Act in *Heckler v. Ringer*, 466 U.S. 602, 104 (1984). *See* 880 F.2d at 1336. In *Heckler*, this Court defined the word "claim" under the Medicare Act to include a challenge to agency policy that would prevent the plaintiff from getting an operation upon which a claim would be based. The distinction between *Heckler* and *Ayuda* is obvious. Congress did not use the language "claim arising under the provisions of this Act" when crafting IRCA's judicial review provisions. Indeed, this broad terminology is linguistically much closer to the term "all causes . . . arising under any of the provisions of this subchapter", contained in the INA's grant of jurisdiction to the district courts, 8 U.S.C. § 1329, than it is to the phrase "determination respecting an application."

the general jurisdictional grant of 8 U.S.C. § 1329. In addition, for cases arising under IRCA, it renders meaningless the grant of federal question jurisdiction in 28 U.S.C. § 1331. Congress could not have intended such an absurd result. As this Court stated in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."

Furthermore, the *Ayuda* majority is unable to find in IRCA any clear expression of Congressional intent to preclude federal question jurisdiction of INS rulemaking.[22] Instead the court relies upon the Senate version of the legalization judicial review provisions—never actually passed—and speculation about the Senate's motivation for acceding to the House bill. Thus the majority, though professing not to do so (*see* 880 F.2d at 1334-35), invents a new canon of statutory construction—that allegedly ambiguous statutes should be interpreted in favor of the House of Congress that *acquiesces* in the eventual text.

The Senate version of the judicial review provisions would have precluded judicial review of any "decision or determination under this section." S.1200, 99th Cong., 1st Sess. § 202(f)(1) (1985). Arguably, this Senate version might have precluded review of rulemaking as well as adjudication. *See* S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985). Recognizing that the House version which eventually became law was less restrictive than the Senate version, the *Ayuda* majority nevertheless states: "[W]e think it unlikely that the Senate would have agreed to the

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[22] The one "expression" that the Court does discuss is a statement made by Senator Cranston during a 1983 floor debate over an immigration reform bill that ultimately was fatally stalled in conference in the 98th Congress. *See* 880 F.2d at 1334-35. The judicial review provision which Senator Cranston discussed at the time was never enacted, and its language differed significantly from that which was ultimately passed. *See* 880 F.2d at 1353 n.7 (Wald, C.J., dissenting).

House language with the understanding that it permitted not only review of legalization determinations in the courts of appeals after deportation orders but also even more expansive, intrusive and direct review of policy determinations that would or could lead to denials of applications for adjustment." *Ayuda v. Thornburgh*, 880 F.2d at 1334-1335.

Certainly, the *Ayuda* majority's musings about the type of review the Senate *thought* it was accepting in agreeing to the House version are something far less than the "clearly expressed legislative intention" to preclude review. Moreover, the majority's theory that the House and Senate versions were in effect the same fails to explain why the House did not acquiesce in the Senate's more restrictive language.

The legislative history patently shows that Congress rejected a restrictive Senate judicial review provision which would have arguably cut off review of INS rulemaking in favor of a more generously worded House provision. Congress's final choice of language clearly demonstrates that it intended to preserve federal question jurisdiction over INS rulemaking with respect to legalization.

Finally, the *Ayuda* majority loses sight of the fact that Congress created IRCA's judicial review provisions against a well-established background of case law holding that 8 U.S.C. § 1105a does not preclude broad-based regulatory challenges. *See supra* at 15-18. When adopting a new law incorporating sections of a prior law, Congress can be presumed to have knowledge of the interpretation given to the incorporated law, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782, n.15 (1985),[23] and to adopt that interpretation when it incorporates the prior law with-

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[23] *See also Lorillard v. Pons*, 434 U.S. 575, 580-581, (1978); *Bob Jones University v. United States*, 461 U.S. 574, 601-602 (1983); *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).

out change. *Id. See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920). That Congress implemented judicial review of legalization denials through the preexisting statutory structure of 8 U.S.C. § 1105a—without further restriction of or change to that section—establishes that Congress did not seek to alter legislatively the case law on § 1105a with respect to IRCA.[24]

III. THERE WAS NO LEGISLATIVE INTENT TO PRECLUDE FEDERAL QUESTION JURISDICTION OF CHALLENGES BROUGHT BY QUALIFIED DESIGNATED ENTITIES

As in its analysis of the judicial review sections of IRCA, the *Ayuda* majority undermines the presumption of judicial reviewability by finding in IRCA's legislative history an "implied preclusion of suits by QDEs or other organizations." 880 F.2d at 1340. Yet such a preclusion is not even "fairly discernible in the statutory scheme." *Block v. Community Nutrition Institute*, 467 U.S. at 351. It is nonexistent.

The *Ayuda* majority asserts that the interests of QDEs are "clearly so similar to those of the aliens that no statutory interest is left unprotected" by precluding judicial review of challenges raised by QDEs. 880 F.2d at 1340. Yet the goal of offering capable, informed assistance to

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[24] Paradoxically, the *Ayuda* majority rejected petitioners' reliance on *International Union, UAW v. Brock*, 477 U.S. 274 (1986), in which this Court held that the judicial review provisions of the Trade Act of 1974 regarding trade readjustment allowance benefits did not bar a union's federal district court challenge to a Trade Act regulation relating to these benefits. The *Ayuda* court stated that "[t]he Trade Act was passed against a background of a line of cases in the Supreme Court and lower federal courts holding that there is a federal jurisdiction to review state unemployment insurance claims that raise questions of federal law," 880 F.2d at 1338, but refused to recognize that a similar contemporary legal context existed when Congress passed IRCA.

legalization applicants is quite distinct from that of successfully obtaining legal status. QDEs are discrete legal entities from the aliens they represent and therefore suffer significantly different types of harm as the result of an unlawful regulation.[25]

Having created the special role of QDEs,[26] it is hardly conceivable that Congress would have prevented them from seeking judicially-mandated relief to protect that role. In the absence of evidence that Congress intended to restrict judicial review of challenges raised by QDEs and other organizations, under the teachings of this Court in *Abbott Laboratories, Inc. v. Gardner*, *supra*, and *Traynor v. Turnage*, *supra*, review is to be presumed.

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[25] The district court found that the QDE Plaintiffs in this case suffered both a palpable impairment to their ability to perform core statutory functions and a direct financial injury resulting from the INS's promulgation of its unlawful "known to the Government" regulation and guidelines, and that those harms were significantly different from the harms suffered by the individual alien plaintiffs. *Ayuda v. Meese*, 687 F. Supp. at 655-657. In a like manner, the district court found this case to be "a classic case for organizational standing." *Id.* at 657-60. *See also* Chief Judge Wald's dissent, 880 F.2d at 1364-65.

[26] Congress recognized that potential applicants for legalization were members of a "fearful and clearly exploitable" "subclass" within American society, S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985), naturally wary of governmental authority. H. Rep. No. 682, 99th Cong., 2d Sess. 49 (1986). In order to garner a high participation rate in an atmosphere of trust and understanding, *id.* at 73, Congress established QDEs to reach out to the illegal alien community, to encourage and assist them in applying for legalization. 8 U.S.C. § 1255a(c)(2). *See* S. Rep. No. 132 at 47. QDEs are required, by statute, to act as intermediaries between the INS and the alien community, to counsel applicants, disseminate information about the program and to screen and process applications. *See* 8 U.S.C. § 1255a(c)(1)-(4). Clearly an essential component of the statutory function of the QDEs was a solid understanding of the parameters of the legalization eligibility requirements and an ability to explain and apply these requirements.

IV. THE INS'S ACTION ON SECTION 265 CLAIMS CONSISTED OF A REGULATION AND POLICY STATEMENTS AND WAS THEREFORE FINAL ACTION RIPE FOR JUDICIAL REVIEW, ESPECIALLY IN LIGHT OF THE IMPENDING APPLICATION DEADLINE

The *Ayuda* majority also holds that the district court lacked jurisdiction because the INS policy on § 265 cases was not "final" within the meaning of the APA, 5 U.S.C. § 704, and therefore was not "ripe" for review under *Abbott Laboratories v. Gardner*, 387 U.S. at 149.[27] *Ayuda v. Thornburgh*, 880 F.2d at 1341. The majority's position on ripeness is based upon glaring misconceptions about the facts and the procedural history of the case and a distorted application of the case law on finality.

The inquiry on ripeness in this case must begin with the regulation itself. The "known to the Government" regulation codified at 8 C.F.R. § 245a.1(d) was found by the district court to be "contrary to law" on March 30, 1988. 8 C.F.R. § 245a.1(d) provided that "[a]s *used in this chapter*," the term "government" in the clause "alien's unlawful status was known to the government" "means the Immigration and Naturalization Service."[28] The regulation further states that "[a]n alien's unlawful status was 'known to the government' *only if*" that alien met one of three (and later four) enumerated standards, each requiring the

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[27] *Abbott Laboratories v. Gardner* established a two-part test for ripeness. A lower court must consider "both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. *See also, Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 435 (D.C. Cir. 1986): "The inquiry as to fitness for review encompasses several factors, including whether the issue presented is a purely legal one, whether consideration of that issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final."

[28] The regulation was published in final form on May 1, 1987 [52 Fed. Reg. 16205, 16208 (1987)] and was later amended slightly on November 17, 1989 [52 Fed. Reg. 43845 (1987)].

presence of a document in the files of the INS. 8 C.F.R. § 245a.1(d) (emphasis added).

Under 8 C.F.R. § 245a.2(b) *only* those aliens who fell within one of these enumerated "categories" could "file for adjustment to temporary residence status." *All others were prohibited.* There was no discretion on the part of the INS, under the terms of the regulation, to accept applications from aliens who did not meet the criteria.

This necessarily precluded those who had § 265 claims from applying, much less having their applications granted by the INS. The *Ayuda* majority therefore is simply wrong when it states that "[t]he INS had never taken a position on the particular question posed by section 265 claimants . . ." or that a ruling on the "known" component of the "known to the Government" standard was "anticipatory . . . without a clear indication of the government's own interpretation." 880 F.2d at 1345. By its terms, 8 C.F.R. § 245a.2 precluded § 265 claimants from filing.[29]

The *Ayuda* majority asserts, however, that the district court, having declared the INS's regulation invalid, should have given the INS the opportunity to consider administratively whether the § 265 situation was encompassed in its redefinition of the statutory term. Even granting this,

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[29] The *Ayuda* majority also erroneously states that "[t]he issue apparently was not raised before the agency during the rulemaking process . . . ." 880 F.2d at 1345. During the comment period for the proposed regulations, an immigration attorney from Texas, Eugene J. Flynn, submitted comments on the "known to the Government" regulations. These comments specifically raised the issue of the absence of a document from government files. Mr. Flynn commented " 'Known to the Government' can simply mean that there is actually something *missing* from the file that conclusively shows that an alien, on whatever date, was in violation of his status." (Emphasis added.) While the INS, in its Preamble to the final regulation, did not specifically address this issue, it did say that it had given "review and careful consideration [to] all comments" on the "known to the Government" proposal. 52 Fed. Reg. at 16206 (1987).

the district court did give the INS such an opportunity. Following the entry of the district court's March 30, 1988 order, the INS filed with the court a copy of an official INS "Telegraphic Message" sent on April 15, 1988, to all Immigration Offices. This Message states, *inter alia*:

> The instruction on the "known to the government" court standard is clarified as follows: *documentation* must have existed in one or more federal agencies so that when such *documentation* is taken as a whole it would warrant the finding that the nonimmigrant alien's status in the United States was unlawful. Such *documentation* must be in the files of the government prior to January 1, 1982 . . . (emphasis added).

The INS, on April 13, 1988, also sent letters to all QDEs with similar statements concerning "documentation." These letters concluded with the statement that "the violation must be able to be induced from evidence *submitted to* Federal agencies only, and prior to January 1, 1982." (Emphasis added.)

The requirement of *documentation submitted to* a federal agency, necessarily precludes an alien from asserting a § 265 claim under the "known to the Government" provision. It is the *absence* of documentation (that is, the knowing *failure* to file quarterly or annual reports prior to 1982) which puts a government agency on notice of unlawful status and thereby renders non-registrants eligible for legalization.

The *Ayuda* majority further neglects completely the fact that the statutory deadline, in practical effect, rendered the INS's action ripe for review. Congress allowed only a twelve-month period for aliens to apply, and that period lapsed on May 4, 1988. 8 U.S.C. §1255a(a)(1)(A). Even the *Ayuda* majority concedes that for almost eleven of those twelve months (that is, until the district court ruling on March 30, 1988), an INS regulation was in place which

"appears to have precluded section 265 claims." 880 F.2d at 1342. Following the district court ruling, the record shows that every INS official before whom the § 265 issue was presented recommended denial of legalization benefits, consistent with the INS's original regulation defining "known to the Government." Given the impending application deadline, awaiting a more formal expression of the INS's position on this issue might well have caused the issue to become moot for those aliens who, unsure of their eligibility, had not filed applications prior to May 4, 1988.[30] For QDEs and community organizations, too, the deadline meant that the § 265 issue had to be resolved while these organizations could still advise aliens whether to proceed with their legalization applications. As this Court has instructed, the finality requirements are to be applied in a "flexible" and "pragmatic" way. *See Abbott Laboratories v. Gardner*, 387 U.S. at 149-150. Realistically, the INS's position on the § 265 theory of eligibility for legalization was as final as it was going to become under the circumstances.[31]

Clearly, there was no governmental or judicial interest in delaying judicial review. Even the INS should have supported such review, as a speedy resolution would promote

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[30] Whether the district court would have had the power either to extend the statutory deadline or to view the subsequently filed applications as constructively filed remains an open issue. *See In Re Thornburgh, supra.* However, the practical effect of a fixed-date statutory deadline was sufficient to warrant the district court's action.

[31] Furthermore, the question whether the district court's definition of the term "known to the Government" encompassed § 265 violations was a purely legal one, the consideration of which would not have benefited from a more concrete factual setting. *Id. See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581-582 (1985). *See also Ciba-Geigy Corporation v. U.S. E.P.A.*, 801 F.2d 430, 435 (D.C. Cir. 1986). Indeed, the question merely required a clarification of the scope of the district court's prior orders. The resolution of the question would certainly not have varied based upon the factual situation of a particular applicant.

efficient and uniform adjudication of legalization applications. "[I]n the absence of any 'significant agency or judicial interests militating in favor of delay, we cannot imagine how the hardship factor could ever tip the balance against judicial review.' " *Hotel and Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F.Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499, 1508 (D.C. Cir. 1988) (*en banc*) (opinion of Judge Mikva), *quoting Payne Enterprises v. U.S.*, 837 F.2d 486, 493 n.10 (D.C. Cir. 1988). Even if the INS or the court could have enunciated a reason for postponing review, the hardship to the parties was of such an immediate and practical impact that it would have outweighed any institutional interest in delaying review. *See Eagle-Picher Industries v. U.S. E.P.A.*, 759 F.2d 905, 915 (1985).[32]

Contrary to the assertion of the *Ayuda* majority, the record in this case, and the Complaint itself, demonstrate incontrovertibly that the organizational plaintiffs alleged hardship in their counseling role. *See, e.g.*, Complaint, ¶¶ 10, 13, 17, 22-21.[33] Many QDEs and other organizations

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[32] The hardship to the aliens was found by the district court to be real, immediate, and irreparable. As that court found in its original March 30, 1988 order:

> The testimony shows that the individual plaintiffs are generally people without extensive financial resources. They will have a hard time paying the application fee. It would be foolhardy for many of them to pay the filing fee while faced with INS' "known to the Government" regulation—which makes it quite clear that they will place their money at great risk. Hence, if the status quo continues, most of them will not apply for legalization. If an otherwise eligible alien does not submit an application prior to May 4, 1988, he or she may well be forever barred from applying for legalization. . . .

Ayuda v. Meese, 687 F.Supp. at 665-66.

[33] *See also* Proposed Intervenors' Complaint ¶¶ 8, 12-23, and 29.

were expending enormous amounts of time and resources to find possible avenues of relief for § 265 violators. In deciding whether to advise § 265 claimants to go forward with their applications, these organizations faced a perplexing dilemma: Should they counsel such aliens not to file applications, given the significant application fee and the INS policy of recommending denial in these cases, or should they advise aliens to go forward out a belief that the aliens might forfeit their rights altogether by failing to file an apparently futile application prior to May 5, 1989?

Especially in the waning days of the legalization program, when plaintiff organizations' first instinct would be to encourage as many aliens as possible to attempt to obtain legalization benefits prior to the expiration of the deadline, the confusion over the § 265 theory of eligibility presented a very real and compelling hardship which militated in favor of judicial review.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of *certiorari* should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AYUDA, INC., *et al.*,

Petitioners,

v.

RICHARD THORNBURGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 7, 1989 Decided July 18, 1989

No. 88-5226

AYUDA, INC., et al.

v.

RICHARD THORNBURGH, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 88-00625)

Donald E. Keener, Attorney, Department of Justice, with whom *David J. Kline*, Assistant Director, Office of Immigration Litigation, Department of Justice, and *John R. Bolton*, Assistant Attorney General, Civil Division, Department of Justice, were on the brief, for appellants.

Wayne H. Matelski, with whom *Lynda S. Zengerle*, *Carolyn Waller*, *Michael Rubin*, *David Aronofsky* and *Deborah Sanders* were on the brief, for appellees.

Before: WALD, *Chief Judge*, SILBERMAN and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Chief Judge* WALD.

SILBERMAN, *Circuit Judge*: This is an appeal from a declaratory order and injunction issued by the district court concerning implementation of the legalization or "amnesty" provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). We hold the district court lacked jurisdiction and therefore vacate the order.

I.

IRCA, passed in 1986, imposed civil and criminal penalties upon employers who hire illegal aliens. Congress, through that approach, sought to discourage illegal immigration into the United States and to make it difficult for undocumented aliens to remain in the country. As part of a legislative compromise, the Act provided for the legalization of those immigrants who had entered the United States unlawfully prior to January 1, 1982, and had resided continuously in the country in an unlawful status since then. It was said that "past failures to enforce[] the immigration laws have allowed [illegal immigrants] to enter and settle here" and that "the alternative of intensifying interior enforcement or attempting mass deportations would be . . . costly, ineffective and inconsistent with our immigrant heritage." H.R. REP. NO. 682, 99th Cong., 2d Sess. pt. 1, at 49 (1986).

As a corollary, Congress also provided for the legalization of *non*immigrants, who entered the country lawfully (for example, as employees or students) but whose presence subsequently became unlawful, so long as their status was unlawful prior to January 1, 1982 and they resided continuously in the United States after that date.[1]

[1] Nonimmigrant aliens are special classes of aliens who are lawfully admitted to the United States and have no intention of abandoning permanently their residence in a foreign country. *See* 8 U.S.C. § 1101(a)(15) (1982). Nonimmi-

Perhaps counterintuitively, then, in order to qualify for legalization under this corollary provision to the general amnesty program, the nonimmigrant had to prove his *illegal* status prior to 1982. That could be accomplished, according to section 245A of the Act, in one of two ways:

> In the case of an alien who entered the United States before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time *or the alien's unlawful status was known to the Government as of such date.*

8 U.S.C. § 1255a(a)(2)(B) (Supp. V 1987) (emphasis added).

This case involves the interpretation of the second clause of that provision: what does "known to the Government" mean? In 1987, the INS issued a regulation defining "Government" to mean only the Immigration and Naturalization Service, based on the notion that the Attorney General and the INS were charged with enforcement of the immigration laws (and implicitly responsible for "past failures") and only they could ascertain—truly "know"—that an alien's status was "unlawful." A broader interpretation of "Government," the agency concluded, would make administration of the legalization program difficult and "would vest [other] government agencies with an authority that Congress specifically granted only to the Attorney General." 52 Fed. Reg. at 16,206 (1987). The regulation provided that an alien who originally entered legally could establish that his subsequent illegal status was "known to the Government" prior to 1982 through one of the following documents: (1) an INS record received from another agency, referring to a clear statement or declaration by the alien to the other federal agency that he was in violation of nonimmigrant

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grants include, *inter alia*, foreign students and managerial employees of companies located in the United States.

status; (2) a record showing an affirmative determination by the INS prior to January 1, 1982 that the alien was subject to deportation proceedings; (3) a copy of a response by the INS to any other agency, stating that a particular alien had no legal status in the United States; or (4) school records which establish that a school forwarded to the INS a report clearly indicating that the applicant had violated his nonimmigrant status prior to January 1, 1982. *Id.* at 16,208; 52 Fed. Reg. at 43,845 (1987).

Under the statute, all aliens seeking to qualify for legalization were obliged to apply for an adjustment of status within a twelve-month period that expired on May 4, 1988. On March 8, only two months before the deadline, appellees, which include four organizations that advise and counsel aliens—Ayuda, Inc., The Ethiopian Community Center, the Latin American Youth Center, and the Mexican American Legal Defense and Educational Fund—and five individual aliens, sued in district court claiming that the INS regulation was based on an impermissible interpretation of the statute. They sought a declaratory order and injunction preventing the INS from applying a "known to the Government" standard that barred an alien from legalization "whenever the federal Government, through *any* of its agencies, departments, bureaus or entities has or had evidence that, separately or in combination, shows that such alien had violated his or her nonimmigrant status prior to January 1, 1982." The government challenged the jurisdiction of the district court, asserting that the organizational plaintiffs lacked standing to sue, and that review of legalization determinations was available only in the court of appeals after an individual claimant had exhausted his administrative remedies and been subject to a deportation order entered pursuant to section 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (1982).

The organizational plaintiffs responded that the normal procedures for administrative determination and judicial review in the courts of appeals designed for aggrieved aliens did not preclude them from bringing an action in the district court pursuant to the APA, because their mission was to advise aliens on how to proceed through the legalization program and, particularly, on their prospects for receiving amnesty. The INS's alleged misconstruction of the statute caused injury to the counseling organizations, they complained, because it impaired their ability to provide accurate information about IRCA eligibility requirements to aliens and required them to expend additional resources to clarify the confusion about the correct legal standard. One organization also asserted that the INS's interpretation of IRCA was unlawful and frustrated the organization's purpose of assisting aliens to obtain legalization. Because the statutory administrative and judicial procedures were not designed to remedy this type of injury, appellees contended APA review was available in district court. The individual plaintiffs asserted that although there is an exclusive statutory mechanism for judicial review of individual legalization determinations, the district court nevertheless had jurisdiction to hear a challenge to the INS's IRCA regulation as long as specific legalization applications were not involved. Appellees argued further that because the May 4, 1988 application deadline was rapidly approaching, an injunction was warranted.

The district court (without reaching the claims of the individual aliens) concluded that the organizational plaintiffs had standing to sue and that judicial review of decisions regarding the legalization program was available in the district court. *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 654-60 (D.D.C. 1988). The court held that the term "Government" in section 245A meant the entire United States Government and not simply the INS, and declared the INS regulation "contrary to law." *Id.* at 666. The INS was also enjoined from "any further ap-

plication of the regulation" anywhere in the United States, and ordered "to take steps to notify promptly all persons affected by the regulation of the court's decision," *id.*, the court observing that appellee organizations "need certainty in this field, and they need it now." *Id.* at 657. The government acquiesced in the court's interpretation of the statute and did not appeal its order.

The court retained jurisdiction of the case "to assure [the] decree [was] carried out fully and completely and to provide such other and further relief as [might] be necessary to implement [its] decision." *Id.* at 666. Subsequently, the court issued nine supplemental orders dealing with various aspects of the "known to the Government" provision of IRCA. The first supplemental order, issued April 5, 1988, noted that "[a] question has arisen with respect to the precise meaning of the term 'unlawful status was known to the Government,' " and directed that an alien could satisfy the standard by showing that "documentation existed in one or more government agencies so that . . . such documentation *taken as a whole* would warrant the finding that the nonimmigrant alien's status in the United States was unlawful." *Id.* (emphasis added). The government has not appealed this supplemental order either.

Eleven new organizations filed a motion to intervene in the case on April 21, 1988. They raised an issue, not previously surfaced, concerning the interrelationship between section 245A of IRCA and former section 265 of the Immigration and Nationality Act, 8 U.S.C. § 1305 (1976), *amended by* 8 U.S.C. § 1305 (1982). Under the latter provision (prior to its amendment on December 29, 1981), every nonimmigrant alien who remained in the United States for more than 30 days was required to report his address to the Attorney General on a quarterly basis. *Id.*; *see* 8 C.F.R. § 265.1 (1981). Any alien failing to comply with this reporting requirement was subject to deportation unless he could show that such failure

was "reasonably excusable or was not willful." 8 U.S.C. § 1306(b) (1982). The putative intervenors alleged that the INS had been "denying these nonimmigrant aliens [who violated the reporting requirement prior to 1982] the opportunity to apply for legalization, even after this court's clarification of the 'known to the Government' standard in the present litigation."

In other words, the proposed intervenors claimed that the district court's first supplemental order should be interpreted, or extended, to include an alien's *failure* to provide documentation—the quarterly report—which failure might have led the INS to conclude that the alien had slipped into illegal status. The district court never granted the motion to intervene, but appellees adopted the intervenors' claim and sought, over the government's objections, a new supplemental order addressing the issue. The court granted the order—Supplemental Order V—enjoining the INS from denying legalization to nonimmigrants who failed to meet the reporting requirements of section 265, "if INS determines that such aliens have credibly established their willful violation of section 265 and such aliens have also met all other applicable conditions for legalization." 687 F. Supp. at 668. The INS was directed to accept applications from section 265 nonreporters without the statutorily-required filing fee in order to prevent aliens from forfeiting the fee should Supplemental Order V be reversed on appeal. *Id.* The government does appeal this order, in effect challenging the district court's jurisdiction over the entire case (although not contesting the other orders) and, alternatively, disputing the propriety of Supplemental Order V.

II.

As part and parcel of the amnesty or legalization provisions of IRCA, Congress provided for administrative and judicial review of the application of the Act. According to the government, these provisions require exhaustion

of administrrative remedies before a party seeks judicial review and vest exclusive jurisdiction in the courts of appeals to review INS decisions that are or could be made in the administrative process. The district court, the government concludes, therefore lacked jurisdiction to entertain the action.

The Act provides: "[t]here shall be no administrative or judicial review of a *determination respecting* an *application* for adjustment of status under this section [the legalization provisions] except in accordance with this subsection." 8 U.S.C. § 1255a(f)(1) (Supp. V 1987) (emphasis added). The Attorney General is directed to "establish an appellate authority to provide for a single level of administrative appellate review of [such] a determination," *id.* § 1255a(f)(3)(A), and "there shall be judicial review of such a denial *only* in the judicial review of an order of deportation under section 1105(a) of this title." *Id.* § 1255a(f)(4)(A) (emphasis added). That judicial review "shall be based solely upon the administrative record" and the "determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to *clear* and *convincing* facts contained in the record considered as a whole." *Id.* § 1255a(f)(4)(B) (emphasis added).

That standard of review—perhaps even more deferential than the arbitrary or capricious standard and the requirement of substantial evidence on the record as a whole—is about as restrictive as the Congress can fashion. *See Jamesway Corp. v. NLRB*, 676 F.2d 63, 67 n.4 (3d Cir. 1982) (abuse of discretion more deferential than substantial evidence standard); *Bennett v. Tucker*, 827 F.2d 63, 68 (7th Cir. 1987) (characterizing abuse of discretion as court's "most deferential standard"). It would appear that even legal questions concerning the interpretation of IRCA are reviewable only under the abuse of discretion standard rather than the companion "contrary to law" formulation of the APA. That is a rare, but not

unknown, treatment of reviewability of legal issues. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2546 (1988).[2] The legislative history clearly indicates that this restrictive scope of judicial review was quite purposeful. The Senate version of the bill, despite Senator Cranston's concern that it raised constitutional problems, *see* 129 Cong. Rec. 12,810 (1983),[3] provided for "no judicial review of a decision or determination with *respect to the legalization programs.*" S. REP. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added). The House-Senate conference committee, however, adopted the House version, which included the less restrictive yet very deferential judicial review provisions that make up the present law.

Appellees—including the individual plaintiffs—argue, nevertheless, that their suit in district court could be brought outside the framework of an appeal of a deportation order, because it challenged not a "determination respecting an application for adjustment," but rather an INS policy (drawn from its regulation) that would be applied subsequently in individual cases. In their view, the administrative procedure that must be exhausted ap-

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[2] It may well be that if the substantive issue in this case were presented in the context of an appeal to a court of appeals, the court's scope of review and deference to agency's interpretation would not differ markedly from the APA. Almost surely, constitutional questions, for instance, would be subject to review *de novo*. *Cf. Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."). And the relationship between the "abuse of discretion" standard and the deferential scope of review under the second prong of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), is a subtle analytical matter. Suffice it to note that Congress used an unusually restrictive scope of review in IRCA.

[3] Senator Cranston's comments came during debate over an immigration reform bill in the 98th Congress, which included the same bar to judicial review as the bill passed by the Senate in the 99th Congress.

plies only to determinations made in individual legalization cases and not to broad challenges to an INS policy or legal position that could apply to many cases. The courts of appeals, it follows, have exclusive review jurisdiction only over the former; the latter sort of proceedings may be brought pursuant to the APA and resting on general federal question jurisdiction (28 U.S.C. § 1331) in the district court to challenge agency "actions," like the issuance of the regulation before us, independent of any specific determination involving an individual alien.

If appellees are correct, such a challenge could be brought not only by an organization alleging an independent injury, but by an individual alien (presumably prior to a denial of legalization), a group of aliens, or an organization representing their interests. These potential plaintiffs would thereby gain significant litigating advantages. For one thing—as happened in this very case—the district court could avoid the difficult analytical problem of discerning the relationship between the "abuse of discretion" scope of review that applies in the courts of appeals and the normal scrutiny given agency interpretations of their organic statutes. More importantly, such an action, particularly if it includes a request for an injunction, could offer the opportunity decisively to influence the INS's behavior all over the country—and do so quickly. *See, e.g., Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (nationwide relief may be appropriate even in an individual action); *Decker v. O'Donnell*, 661 F.2d 598, 617-18 (7th Cir. 1980) (nationwide injunction appropriate in case of facial challenge to legality of agency regulation). If denials of legalization are appealed to the courts of appeals only after subsequent deportation orders, it would take a good deal more time to gain a judicial judgment on the legality of the INS's interpretation of a statutory term such as "known to the Government." The courts of appeals, moreover, may well differ in their views as to the legality of the INS's construction of the statute. Even were the INS to acquiesce in an un-

favorable judicial interpretation in one circuit,[4] it would surely not be obliged to do so in other circuits that had not decided the question. And, of course, an unfavorable ruling in one circuit would not prevent the INS from continuing to follow its interpretation of the statute in other cases nationwide. *United States v. Mendoza*, 464 U.S. 154, 160-63 (1984).

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[4] Whether an agency is *required* as a matter of law to acquiesce in an unfavorable ruling when future cases arise in the same circuit court of appeals is a matter of much debate. *See generally*, Note, *Agency Nonacquiescence: Implementation, Justification, and Acceptability*, 42 Wash. & Lee L. Rev. 1233 (1985); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 Col. L. Rev. 582 (1985). Some agencies—particularly the Social Security Administration, the Internal Revenue Service, and the National Labor Relations Board—have adopted explicit policies of intracircuit nonacquiescence, and have argued, *inter alia*, that their policy is justified by the need to guarantee nationwide uniformity of laws, rules, and regulations to all claimants. Although some courts have expressed disapproval of intracircuit nonacquiescence, *see, e.g., Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir. 1980), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), and even suggested that it might be unconstitutional, *Stieberger v. Heckler*, 615 F. Supp. 1315, 1363 (S.D.N.Y. 1985), *vacated on other grounds sub. nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986), we have never decided the issue. *Compare Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 383 (D.C. Cir. 1983) (opinion of MacKinnon, J.) (admonishing the Board "to halt its apparently *willful* defiance of long established, controlling judicial precedent") *with id.* at 384 (Wright, J., concurring) (refusing to concur in condemnation of Board's intracircuit nonacquiescence) *and id.* at 385 (Bork, J., concurring) (declining to agree or disagree with criticism of Board but noting that "[a]n agency with nationwide jurisdiction is not required to conform to every interpretation given a statute by a court of appeals"). Even the most vociferous critics of intracircuit nonacquiesence have conceded the validity of the policy in at least some instances. *See Stieberger*, 615 F. Supp. at 1365-66.

Whether or not the judicial review provisions of IRCA preclude direct recourse to the district court to challenge the INS's construction of the statute embodied in a regulation depends, of course, on congressional intent. Paradoxically, appellees' construction of those IRCA provisions suggests that Congress wished to channel to the courts of appeals only the application of the statute in presumably less important individual cases while reserving to initial district court review (albeit subject to subsequent appeal) the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens. *But cf.* H.R. REP. No. 1086, 87th Cong., 1st Sess. 28 (1961) ("Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater scrutiny, and more assurance of a close study of his case by experienced judges."). While some courts have found that allocation of jurisdiction appropriate under the judicial review provisions of section 106, apparently because they believed the only purpose of exclusive court of appeals jurisdiction was to prevent piecemeal litigation by aliens in the district courts that would delay deportation, *see, e.g., Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982) (discussed *infra*), we do not believe Congress intended that result under IRCA.[5] The language and structure of IRCA, as well as

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[5] In enacting section 106 itself, Congress seems to have been more broadly concerned with "unjustified" litigation, even "unjustified attacks upon the constitutionality of the Immigration and Nationality Act" by "astute attorneys who know how to skillfully exploit the judicial process." H.R. REP. No. 1086, 87th Cong., 1st Sess. 23 (1961). Of course, jurisdiction could not turn on the justification (merits) of a claim, but Congress' concern about attorneys' skill in using the judicial process to frustrate deportation proceedings by such devices as forum shopping, *see id.* at 28-29, seems relevant to the *HRC v. Smith* exception—and perhaps even more pertinent to the instant case.

its legislative history, do not support appellees's interpretation.

Appellees argue that the challenged regulation and its applicability to section 265 do not constitute a "determination respecting *an application* for adjustment," reviewable only in the courts of appeals, because it is not a ruling on an actual application. Indisputably, however, the regulation embodies determinations that will impact, and therefore are "respecting," future individual applications. We do not understand appellees to contend that "an application" applies only to an individual claim; surely a "determination" might be made in a proceeding in which several applications were consolidated. Rather, appellees seem to argue that the statutory exhaustion requirements and judicial review provisions are confined to determinations made *after* an application is filed. But the phrase "*respecting* an application" on its face does not appear to be so limited. *Cf. Heckler v. Ringer*, 466 U.S. 602, 621 (1984) (defining the word "claim" under the Medicare Act to include a challenge to agency policy that allegedly would prevent the plaintiff from getting an operation upon which a claim would be based).[6]

The dissent, nevertheless, counters that the "determination" to which subsection 245A(f)(1) refers must be more narrowly interpreted, since it must be the same determination referred to by subsection 245A(f)(3)(A)—

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[6] Contrary to the dissent's assertion, Dissent at 9, Congress does not appear to have used the terms "on the application" and "respecting an application" interchangeably. Subsection 245A(f)(1), which uses the term "respecting," refers to both administrative *and judicial* review of legalization determinations. Since judicial review may well be broader than administrative review because only courts would likely declare a regulation invalid as applied (rather than interpret and apply agency regulations), it is quite natural for Congress to use the broad term when referring to judicial review and the narrower term when discussing only administrative review.

"The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1)"—and it could not be thought that a regulation could be challenged in that administrative proceeding. Dissent at 8-12. We do not understand why that is so. Indeed, if the statutory interpretation embodied in the regulation were to be challenged in the court of appeals after a deportation order, it would have to be first raised in the administrative proceeding, because "judicial review shall be based *solely* upon the administrative record." *See* 8 U.S.C. § 1255a(f)(4)(B). It may well be that the administraitve appellate authority would consider itself bound by a regulation issued by the INS, but that does not necessarily suggest its interpretation of the regulation is pre-ordained. That the LAU may be limited as to its scope of review of a determination (or that part of a determination) embodied in a regulation does not suggest that it cannot review the determination.[7] Quite commonly, when reviewing agency applications of their own regulations, we see a somewhat different result than might have been expected. The doctrine of special judicial deference to administrative agency adjudicatory interpretation of agency regulations grows out of just that experience. *See Udall v. Tallman*, 380 U.S. 1 (1965). The

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[7] Of course, the LAU would not, as the dissent suggests, Dissent at 9-10, be reviewing a facial challenge to the regulation, but rather an application of the regulation to an individual. Facial challenges to the regulation are not permitted, because subsection 245A(f)(3) provides that "administrative appellate review shall be based solely upon the administrative record established at the time of the determination *on the application.*" 8 U.S.C. § 1255a(f)(3) (Supp. V 1987). The use of the term "on" in this subsection illustrates that *the LAU* may hear only cases involving challenges to determinations on individual applications for adjustment, and again underscores the significance of Congress' use of the broader term "*respecting* an application" when referring to *judicial* review. *See infra* note 6.

dissent, by characterizing the "determination" reviewable in the courts of appeals as "fact-specific," Dissent at 3, 14 n.5, seems to suggest that such review was not intended to encompass legal questions of statutory interpretation, which were instead to be left to the district courts if and when the INS somehow manifested its statutory interpretations other than in an adjudication. Of course, as we have suggested, that is a rather peculiar way to divide jurisdiction between courts of appeals and district courts. Moreover, in subsection 245A(f)(4)(B), Congress said "findings of fact *and* determinations" shall be conclusive, thereby recognizing that questions of law were meant to be incorporated in the word "determination." *See* 8 U.S.C. § 1255a(f)(4)(B) (Supp. V 1987).

Since the INS was authorized but not obliged to issue regulations interpreting the statutory language,[8] it could have waited until individual legalization proceedings before demonstrating its interpretation of the "known to the Government" language. In that event, surely the courts of appeals would have had, and been expected to exercise, authority to review the agency's interpretation (giving appropriate deference) in the context of individual deportation cases. *See INS v. Chadha*, 462 U.S. 919, 938 (1983). By not requiring the INS to issue regulations that provided an administrative interpretation of statutory language—and not providing a separate mechanism for judicial review of such regulations—Congress must have assumed that the agency's statutory interpretations would be reviewed only in the context of appeals from deportation orders. It seems inconceivable that Congress would have wished instead to closely circumscribe judicial review of legalization decisions that applied whatever regulations the INS issued, and at the

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[8] *See* 8 U.S.C. § 1255a(g) (Supp. V 1987). The INS was *required* to issue regulations on only one issue—the definition of the statutory term "resided continuously." *Id.* § 1255a(g)(1)(A).

same time to allow APA challenges to such regulations in almost any district court of the United States. Indeed, if the district court or any court had jurisdiction to review directly the INS's regulations interpreting IRCA (if issued), Congress would have created a disincentive to issuance of those regulations—which hardly accords with the desirability of providing aliens with prompt information as to the government's interpretation of the statute.

Once it is recognized, as it must be, that an alien could challenge, on appeal from a deportation order, an interpretive regulation which causes the INS to deny his legalization claim, it follows that the district court lacked jurisdiction to hear the same claim in a different forum. For subsection 245A(f)(4)(A) of IRCA limits judicial review of "such" denials to review of deportation orders. Congress thereby explictly prohibited an alien from mounting two parallel challenges to the same regulation. The dissent nevertheless reads the statute to permit an alien to challenge in the district court a regulation that would affect him—apparently before he files a "piece of paper" seeking legalization—and then, in a duplicate procedure, to challenge the same regulation on appeal from a deportation order. Under those circumstances we could have two cases before us: one on appeal from the district court, and one on appeal from a deportation order raising essentially the same claims. It is not at all clear that in light of that possibility the district court could have jurisdiction even in the absence of subsection 245A(f)(4)(A), *see Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984); *Investment Co. Inst. v. Board of Governors*, 551 F.2d 1270, 1278-80 (D.C. Cir. 1977), but, in any event, the presence of subsection 245A(f)(4)(A) makes it evident that the district court lacks power to entertain the same claim that could be brought to the court of appeals.

The statute's legislative history indicates Congress intended aliens to come forward during the 12-month eli-

gibility period because "'this is the first call and the last call, a one shot deal." 132 Cong. Rec. S16,888 (daily ed. Oct. 17, 1986) (remarks of Sen. Simpson). If aliens did not make a legalization claim during that window period, it was lost forever. An alien could not defend against a deportation order based on a claim of legalization if the claim was not made during the designated twelve months. *See* 8 U.S.C. § 1255a(a)(1) (Supp. V 1987). Accordingly, Congress provided for QDEs to advise aliens as to the validity of this claim: "We are not trying to fool you this time." 132 Cong. Rec. S16,888 (daily ed. Oct 17, 1986) (remarks of Sen. Simpson). But the QDEs were forbidden to make "a determination required by [the statute] to be made by the Attorney General." *Id.* § 1255a(c)(3). It was, therefore, the Attorney General's interpretation of IRCA that Congress expected to have the primary operational impact during the 12-month period.[9]

The dissent ascribes to Congress an interest in providing the alien with "accurate advice," Dissent at 28, and that is undeniable. Accurate, certainly, as to the Attorney General's interpretation of the statute and, perhaps also, the QDEs' best appraisal of whether the courts of appeals (and the Supreme Court) would sustain that interpretation. If, for instance, an alien would not qualify for legalization based on the Attorney General's interpretation of IRCA as a QDE or a private attorney understood it, but the counselor thought the interpretation would not be sustained on review of a deportation order, the alien could rely on the advice and file an application for legalization. Whether the alien ultimately prevailed on appeal from a deportation order would depend—as is typically the case—on the quality of advice he received.

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[9] Of course, if a case had come to the court of appeals on review of a deportation order that raised the section 265 issue, we would have had before us the agency's construction of that term as it applied to a particular applicant.

Only an advisory opinion from the Supreme Court would totally remove any uncertainty, and Congress could not provide for that even if it wished to.

The dissent, although not the district court, appears to find a congressional intent to provide aliens with more than the Attorney General's interpretation of the statute during the window period. It is argued that they were entitled to authoritative judicial review and correction of the Attorney General's misinterpretations ("egregious" or otherwise), *see* Dissent at 22, *before the 12-month period lapsed.* If that were so, Congress would certainly have required the Attorney General quickly to issue regulations covering all foreseeable applications of the statute, *cf., e.g.*, Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 6, 102 Stat. 4055, 4067 (1988) (all implementing regulations "shall be issued . . . within 180 days after the date of enactment"), and also provided for a special expedited judicial review of those regulations in a particular court of appeals. *See Yakus v. United States*, 321 U.S. 414, 440 n.7 (1944) (Congress provided for expedited judicial review in Emergency Court of Appeals of regulations implementing The Emergency Price Control Act); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6924, 6976 (1982 & Supp. V 1987) (EPA Administration required to promulgate certain regulations within eighteen months, and judicial review allowed only in D.C. Circuit within ninety days of issuance).

Congress was surely well aware, when it placed review of agency action in the courts of appeals, that it could take a long time—and often require Supreme Court intervention—before legal uniformity was achieved. That is merely one of the characteristics of our system of federal appellate review, which Congress may avoid if it so wishes. *See, e.g., United States v. Fausto*, 108 S. Ct. 668, 674 (1988) (exclusive review of Merit System Protection Board decisions placed in Federal Circuit to avoid vary-

ing decisions in lower federal courts). To permit one federal district court to short-circuit this process is inconsistent with the system of appellate review provided in the statute. Appellees' approach fundamentally alters the relationship between the Executive Branch and the federal judiciary that Congress decreed, because one district court (supported, if necessary, by one court of appeals) could force the Executive Branch to change its interpretation of a statute. As noted above, a decision by a court of appeals against an agency in an individual case does not bind the agency in other circuits, and perhaps not even in other cases within the same circuit. *See supra* at 10-11.

If anything, the legislative history suggests that Congress, rather than considering such extensive judicial monitoring of the legalization program, only grudgingly provided *any* judicial review even in the context of deportation orders. The choice for the conference committee was between the House version, which was adopted, and the Senate version, which precluded *any* judicial review "of a decision or determination with respect to the legalization programs." Although we do not propose a general canon of construction that ambiguous statutes be interpreted in favor of the house of Congress that acquiesces in the eventual text, we think it unlikely that the Senate would have agreed to the House language with the understanding that it permitted not only review of legalization determinations in the courts of appeals after deportation orders but also even more expansive, intrusive, and direct review of policy determinations that would or could lead to denials of applications for adjustment. As the dissent concedes, Dissent at 14, the Senate bill "would clearly have precluded review of rulemaking as well as adjudication"—i.e., all review of the legalization programs. The leading opponent of the Senate provision, who sought to substitute an amendment "identical to the language proposed by the House committee," believed his change would "merely permit[]" a "very limited form of judicial re-

view" that "would be available only when an improper denial of legalization is raised as a defense in a deportation proceeding already subject to judicial review." 129 Cong. Rec. 12,810 (1983) (statement of Sen. Cranston). The more plausible interpretation of the Senate's acquiescence, therefore, is that an IRCA determination is reviewable *only* in the context of cases brought to the courts of appeals pursuant to section 106 of INA.[10]

Appellees argue that section 106, which provides for court of appeals review of orders issued in deportation proceedings, has itself been interpreted *not* to preclude suits in the district court to challenge agency policies, so it is therefore inappropriate to conclude Congress meant to exercise any tighter rein over IRCA, which channels applicants into deportation proceedings reviewed under section 106. The restrictive judicial review provision of section 106 is "the sole and exclusive procedure for[] the judicial review of all final orders of deportation," 8 U.S.C. § 1105a(a) (1982), and it includes the precondition that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him . . . ." *Id.* § 1105a (c). The Supreme Court has never directly determined whether this section precludes a challenge to agency regulations in the district court *before* the initiation of deportation proceedings. But the Court has read "final

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[10] The dissent, starting from the assumption that "determinations respecting an application" as used in the House bill does not refer to rulemaking, argues that Senator Cranston attempted to adopt the section of the House bill permitting judicial review *after* an order of deportation but not that part allowing separate review of regulations. However, we think Senator Cranston's statement that his amendment was "identical to the language proposed by the House committee" implicitly, if not explicitly, indicates that he thought his amendment would result in equivalent judicial review provisions in the two bills, and thus that "determinations respecting an application" includes regulations.

orders of deportation" to include "all determinations made during the incident to the administrative proceeding conducted by a special inquiry officer, and reviewable *together* by the Board of Immigration Appeals," *Foti v. INS*, 375 U.S. 217, 229 (1963) (emphasis added), and all such determinations are within the exclusive jurisdiction of the courts of appeals. *Id.*; *see also Giova v. Rosenberg*, 379 U.S. 18 (1964) (denial of motion to reopen deportation proceedings reviewable only under section 106). Although the Court has interpreted section 106 to permit an alien to challenge separately in district court an INS denial of a stay of deportation, issued in an entirely separate proceeding three months *after* a final order of deportation, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), it has suggested that any matter "governed by the regulations applicable to the deportation proceeding itself, and . . . ordinarily presented for disposition to the special inquiry officer who enter[s] the deportation order" is within the exclusive jurisdiction of the courts of appeals. *Id.* at 217. Most recently, in *INS v. Chadha*, 462 U.S. 919 (1983), the Court squarely held that section 106 "includes all matters on which the validity of the final order [of deportation] is contingent, *rather than only those determinations actually made at a hearing*," *id.* at 938 (quoting *INS v. Chadha*, 634 F.2d 408, 412 (9th Cir. 1980)) (emphasis added).

Appellees do have a point, however; as we have noted, lower federal courts have allowed certain plaintiffs to avoid the exhaustion requirement and corresponding exclusive court of appeals jurisdiction under section 106. The Fifth Circuit, in *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982) [hereinafter *HRC v. Smith*], was faced with a broad attack on the practices of immigration judges who heard asylum claims during deportation hearings, and held that an allegation of "a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is . . .

a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief." The court read the grant of exclusive jurisdiction to the courts of appeals as applying only to actions taken in individual deportation proceedings that may affect the determination of the merits of a claim, and authorized any district court "to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.* Although the Fifth Circuit emphasized the narrowness of its holding and promised not to condone any "end-run around the administrative process," *id.*, the application of *HRC v. Smith* has proliferated to the point where it now more nearly resembles a gaping hole in the middle of the INS's defensive line. Other courts have adopted the Fifth Circuit's distinction under section 106 between review of individual deportation orders and broad-based challenges to agency policy on both constitutional and statutory grounds. *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1503 (C.D. Cal. 1988); *Hotel & Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983) (denying motion to dismiss), *summary judgment granted for defendant*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equaly divided court*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 364 (C.D. Cal. 1982).

HRC v. Smith and its progeny, however, are not only unsupported by the Supreme Court's cases on section 106, including the subsequently decided *Chadha*, but appear inconsistent with the reasoning of the Supreme Court in *Heckler v. Ringer*, 466 U.S. 602 (1984). The Court there was faced with a challenge to a ruling issued by the Secretary of Health and Human Services that precluded

payment under Medicare for a particular surgical procedure. The Medicare Act permits judicial review of "any claim arising under" the Act, via 42 U.S.C. § 405(g), only after a claimant seeks payment and exhausts administrative remedies. The plaintiff, Ringer, wished to undergo that procedure, which he could not afford without Medicare reimbursement. He sued in district court for a declaratory judgment, arguing that he was not obliged to exhaust, because he did not yet have a claim and was instead challenging an agency ruling that, in effect, precluded his claim. The Supreme Court refused to accept that distinction, holding that Ringer was "clearly seeking to establish a right to future payments should he ultimately decide to proceed with [the particular] surgery." *Id.* at 621. It recognized that to hold otherwise would allow claimants "to bypass the exhaustion requirements of the Medciare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question." *Id.* To be sure, unlike *HRC v. Smith*, *Ringer* did not present a constitutional claim, but the *HRC v. Smith* line of cases has not been limited to constitutional challenges. *See, e.g., Jean v. Nelson*, 727 F.2d at 980 n.32.[11]

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[11] The dissent's extensive discussion of *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is largely beside the point. *Michigan Academy* did not even question *Ringer*, and the latter case still supports the general propositions that an individual plaintiff may not circumvent a statutory exhaustion requirement by bringing a preemptory declaratory judgment action. Even the plaintiffs in *Michigan Academy* read *Ringer* to mean that "whatever specific procedures [Congress] provided for judicial review . . . were exclusive, and could not be circumvented by resort to the general jurisdiction of the federal courts." *Michigan Academy*, 476 U.S. at 679. No circumvention problem was present in *Michigan Academy*, because Congress had not imposed an exhaustion requirement on claims arising under Part B of the Medicare program.

Unlike *Ringer*, which concerned part A of Medicare, *Michigan Academy* raised the entirely different question whether

We have not been obliged to decide whether there is a "program" exception to section 106—for constitutional or statutory claims—that permits a suit by aliens or those representing them,[12] and we think it is unnecessary to do

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Congress had altogether precluded review of statutory and constitutional challenges under part B. This was so, because in *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982), the Court had interpreted the Medicare Act to preclude judicial review of Part B amount determinations. And those determinations were made by insurance carriers who were not authorized to consider legal challenges to the Act or regulations. The Court thus declined to deem the regulation at issue in *Michigan Academy* an "amount determination," because that would have prevented *any* judicial review of the rule and raised "serious constitutional issues." *Id.* at 680-81 & n.12. That is, of course, not the case in *Ringer* or in IRCA, where review of a rule affecting future claims or applications is available after exhaustion of administrative remedies. In any event, nothing in IRCA suggests that the exclusive review procedure is limited to "quite minor matters," *cf. Michigan Academy*, 476 U.S. at 680, that could affect an application for adjustment. As noted above, *supra* at 12-13, Congress must have expected major legal questions to be resolved in legalization adjudications.

Nor does *Michigan Academy* provide any support for the notion that the appellee organizations can challenge agency regulations in district court, although individual aliens are required to seek review only in the deportation context. *Cf.* Dissent at 30-32. Clearly, the organizational plaintiffs in *Michigan Academy* could challenge regulations in district court *in the same manner as the individual plaintiffs could do so.* But nothing in *Michigan Academy* suggests that an organization could have sued directly in *Ringer*, where the individual claimant was required to exhaust administrative remedies. And the dissent does not even mention *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), the Supreme Court's most recent thorough discussion of preclusion of review under the APA. *See infra* at 30-31.

[12] In *Hotel & Restaurant Employees Union v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc) (equally divided court), four members of the court assumed that the exhaustion requirement of section 106 does not apply to "a general chal-

so here. However, several district courts have applied the Fifth Circuit's approach under section 106 to the judicial review provisions of IRCA. *Doe v. Nelson*, 703 F. Supp. 713, 720-22 (N.D. Ill. 1988) (finding *HRC v. Smith* indistinguishable); *Immigration Assistance Project v. INS*, No. C88-379R, slip op. at 10-11 (W.D. Wash. Nov. 2, 1988) (citing *HRC v. Smith*); *Haitian Refugee Center v. Nelson*, 694 F. Supp. 864, 873-74 (S.D. Fla. 1988) (citing *HRC v. Smith* and reasoning that "[t]o deny jurisdiction would be to allow illegal agency action to go unchallenged"); *Zambrano v. INS*, No. S-88-455, slip op. at 6-7 (E.D. Cal. Aug. 9, 1988). We find these cases unpersuasive; they do not focus on the language and legislative history of ICRA. We think whatever the proper interpretation of section 106 as it relates to "final orders of deportation," IRCA's judicial review provisions, although employing the section 106 machinery, have a broader preclusive effect. It is arguable, for example, that certain INS actions—other than those under IRCA—taken before initiation of deportation proceedings are reviewable in the district court under APA standards, despite the exclusivity provision of section 106. *Cf. Hotel and Restaurant Employees Union v. Smith*, 846 F.2d at 1513 n.2 (opinion of Silberman, J.) (assuming without deciding that an alien could sue to gain direct review of a denial of asylum without waiting for a deportation proceeding); *but see Kashani v. Nelson*, 793 F.2d 828, 826-27 (7th Cir.), *cert. denied*, 479 U.S. 1006 (1986).[13]

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lenge to the INS's entire frameworking for processing applications." *Id.* at 1506 (opinion of Mikva, J.). The other half of the court, citing *International Union, UAW v. Brock*, 477 U.S. 274 (1986), noted that it "may well be" that such an exception exists, but found it unnecessary to examine that contention in depth since they resolved the case on other jurisdictional grounds. *Id.* at 1514 (opinion of Silberman, J.).

[13] It will be recalled that the specific actions challenged in *HRC v. Smith* were denials of asylum requested in the deportation hearings themselves rather than prior to such proceed-

IRCA, however, provides for an alien to seek review of a denial of legalization *only* in the context of a deportation proceeding, *see* 8 U.S.C. § 1255a(f)(4)(A) (Supp. V 1987), so we are not confronted with an argument that APA review could be predicated on the denial of legalization by itself. It is crystal clear—at least with regard to IRCA—that Congress closed that door.

Appellees also rely on *International Union, UAW v. Brock*, 477 U.S. 274 (1986), to support the district court's order. *Brock* concerned the implementation of the Trade Act of 1974, as amended, 19 U.S.C. §§ 2101-2495 (1982 & Supp. V 1987), which established a program of trade readjustment allowance (TRA) benefits for workers who have lost their jobs because of import competition, and provides, *inter alia*, that "[a] determination by a cooperating State agency with respect to entitlement to program benefits under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State [unemployment insurance] law and *only* in that manner and to that extent." *Id.* § 2311(d) (emphasis added); *see id.* § 2319(10). The Court held that the Act authorized a union to sue in federal district court on behalf of its members to challenge a Trade Act regulation issued by the Secretary of Labor, which governed state determinations, notwithstanding the judicial review provision. But *Brock* is distinguishable from *Ringer* (not mentioned in the Court's opinion) and our case, because Congress never intended TRA claimants to exhaust state remedies when challenging the federal guidelines. The Trade Act was passed against a background of a line of cases in the Supreme Court and

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ings. Because a denial of asylum might be reviewable before deportation proceedings, the argument that denials during the proceedings are not separately reviewable rests on less powerful—if not insignificant—grounds. *See Foti*, 375 U.S. at 229; *International Union, UAW v. Brock*, 477 U.S. 274, 294 (1986) (White, J., dissenting).

lower federal courts holding that there is federal jurisdiction to review state unemployment insurance claims that raise questions of federal law. *See Brock*, 477 U.S. at 285.[14] And on its fact, the exhaustion requirement in the Trade Act refers only to "determination[s] by a *cooperating State agency*." If the Trade Act had said—paralleling IRCA—that *any* (federal or state) determination with respect to program benefits was reviewable *only* through the state process, the cases would be more alike.

We do not therefore take *Brock* to mean that in order to confine litigants to administrative procedures reviewable only by certain courts, Congress must affirmatively state that other courts may not hear the same questions if raised in a different form. Often an exclusive procedure for judicial review in the courts of appeals will implicitly, if not explicitly, forbid broad-based challenges to agency practice in the district courts. *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965) (Where Congress "has enacted a specific statutory scheme for obtaining review, . . . the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness."); *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also* 5 U.S.C. § 702 (1982) ("Nothing herein . . . confers authority to grant relief if any other

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[14] Even three of the dissenters in *Brock*, who were in the majority in *Ringer*, seemed to recognize the difference between the cases when they said "[t]he distinction between a challenge to the guideline and a challenge to benefit detrminations might be meaningful if petitioners had only challenged the application of the guidelines to as-yet-unsubmitted claims." *Brock*, 477 U.S. at 294 (White, J., dissenting). The dissent was limited to the proposition that petitioners could not interpret the state administrative review process once it had begun to consider claims under submission.

statute *expressly or impliedly* forbids the relief which is sought.") (emphasis added). The IRCA judicial review provision sets forth that kind of procedure. It limits judicial review of any "determination respecting an application for adjustment" to the courts of appeals, 8 U.S.C. § 245A(f) (Supp. V 1987), and if we were to uphold the district court's authority to enter declaratory and injunctive relief, we would destroy much of the system that Congress crafted.

The district court appeared to agree with our analysis as it affects *individual* plaintiffs,[15] but thought that some of the *organizational* appellees were authorized to challenge the INS policies in district court because of their special status as "qualified designated entities" (QDEs).

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[15] The district court engaged in the following colloquy with appellees' counsel, after counsel asserted that the individual plaintiffs presented the strongest case for jurisdiction.

THE COURT: Well, but the individual plaintiffs, it would seem to me, they would—why, wouldn't they have to go through the administrative process? . . . [I]t seems to me that they can have their status determined through the administrative process.

COUNSEL: I think, Your Honor, they cannot because . . . to do so would be a futile act. We have heard testimony. We have presented affidavits to show that the INS is not changing its opinion.

THE COURT: Why is it futile?

COUNSEL: Because they could never get a reversal in the administrative process.

THE COURT: No, but that's not the standard. The standard is that as long as they can get a reversal in the Court of Appeals. . . . And it would seem to me that they could then have this case go to the Court of Appeals and the Court of Appeals could say . . . it was a bad interpretation. Am I wrong on that? Don't they have an appeal right here? If an individual goes and applies and he's turned down, and he goes up on appeal, can't the Court of Appeals reverse that?

COUNSEL: Yes, obviously, the Court of Appeals could reverse it, and for those individual plaintiffs, the Court of Appeals could do that. It could reverse it.

Since these organizations had no administrative process to which they could appeal, the court reasoned that they must have a remedy somewhere, and that somewhere was federal district court. *Ayuda*, 687 F. Supp. at 660.

In support of the district court, appellees argue that the QDEs' special role in the legalization program implies they are entitled to sue in district court to challenge the INS's regulation even if an alien subject to deportation were not. The Attorney General was obliged under IRCA to "designate qualified voluntary organizations" to assist in the legalization process. 8 U.S.C. § 1255a(c)(2) (Supp. V 1987). Congress, understanding an illegal alien's apprehensions, wished to "assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization." S. REP. No. 132, 99th Cong., 1st Sess. 47 (1985). Since the QDEs' very function was to provide a buffer—a confidential intermediary—between the INS and the alien, appellees insist Congress could not have intended that they would have no independent right to sue. The QDEs and the other organizations claim they are injured—apart from any injury suffered by the aliens—because their ability to advise aliens is impaired by the "uncertainty" caused by the government's regulation and particularly its problematic application to the section 265 issue.

The government responds that the QDEs under IRCA are actually agents of the INS. Cooperative agreements between the Department of Justice and the QDEs direct that the latter "will comply with all relevant INS regulations relating to the legalization . . . programs and follow the instructions in the INS Training Manual," and the statute forbids the QDEs from making "a determination required by [IRCA] to be made by the Attorney General." 8 U.S.C. § 1255a(c)(3) (Supp. V 1987). We thus find much force to the government's argument that

the QDEs' interest is so "inconsistent with the purposes implicit in the statute" that they lack standing to sue. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). It seems to us that Congress, at most, intended the QDEs to act as intermediaries, not litigating ombudsmen. And even if the QDEs are thought of as agents for the aliens, we doubt Congress intended the agents to have broader rights to seek judicial review than do the principals.

But even assuming that the appellee organizations have standing to sue, we think the district court lacked authority to hear their claim, because to do so would clearly frustrate congressional intent to channel all disputes about the legalization program into the courts of appeals under a narrow scope of review. The flaw in the district court's analysis, in our view, is its assumption that every aggrieved party must have a remedy under the statute. It did not consider that Congress sometimes intends to preclude suits by certain classes of plaintiffs, *see* 5 U.S.C. § 701(a)(1) (1982) (judicial review under the APA not available when precluded by statute), and we think a "balanced approach to statutory construction," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 350 (1984), reveals that a congressional purpose in IRCA to preclude judicial review by anyone, except in the deportation context, is " 'fairly discernible in the statutory scheme.' " *Id.* at 351 (quoting *Data Processing v. Camp*, 397 U.S. 150, 157 (1970)).

In *Block*, the Court faced a jurisdictional challenge to an action brought under the APA by consumers disputing the legality of the Secretary of Agriculture's milk marketing orders. The government claimed the consumers lacked standing, but the court did not find it necessary to reach that issue because it determined, instead, that the statute barred consumers from seeking judicial review—a ruling which the court described as "in effect" jurisdictional. *Id.* at 353 n.4; *see also Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987).

Since the statute provided "a detailed mechanism for judicial consideration of particular issues at the behest of particular persons [milk handlers], judicial review of those issues at the behest of *other persons* [was] found to be impliedly precluded." *Id.* at 349 (emphasis added). That detailed mechanism required milk handlers to exhaust administrative remedies before seeking judicial review in *district court.* Although the Court had previously held that producers could seek judicial review despite no statutory provision authorizing such suits, *Stark v. Wickard*, 321 U.S. 288 (1944), the Court in *Block* explained that the producers' interest in *Stark*, which involved a challenge to the Secretary's administration of the fund from which the producers would be paid, could not be protected by the statutory provisions authorizing suits by the handlers, since the latter had no interest in the fund. Therefore, Congress did not intend to preclude suits by the producers, because such suits were "necessary to ensure achievement of the Act's most fundamental objectives—to wit, the protection of the producers of milk and milk products." *Id.* at 352. The consumer's interest in *Block*, conversely, was similar to the handlers, and therefore handlers could be expected to "challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated." *Id.* Consumer suits served no independent purpose and were deemed precluded because they "would undermine the congressional preference for administrative remedies and provide a mechanism for disrupting administration of a congressional scheme." *Id.*

That proposition is even more true here, because the organizations seek review of the INS's actions (without the need to exhaust administrative remedies) in a different court under a somewhat different standard of review than that provided in IRCA. And the interests asserted by the organizations, even if they can be seen as somehow different from those of the aliens who seek legalization, are clearly so similar to those of the aliens that no statutory interest is left unprotected by recog-

nizing Congress' implied preclusion of suits by QDEs or other organizations. Congress allowed individual aliens, who undoubtedly have the most direct interest in the administration of IRCA, to challenge unfavorable INS rulings only in the deportation context. It would undermine Congress' system of administrative remedies and its plan for limited judicial review of IRCA determinations, if QDEs were able to seek declaratory judgments in the district courts without any applicable exhaustion requirement.

III.

The government alternatively argues that even if the district court had jurisdiction to entertain a suit challenging the INS regulation, it lacked jurisdiction to consider the narrower question presented in this appeal—whether the INS "policy" applied to section 265 cases was lawful—because the INS had not taken "final agency action" or the issue was not ripe for review. We go on to decide this question, thus resting our judgment on alternative holdings, because statutory exhaustion requirements (and the *Block* variation) as well as ripeness and finality are all jurisdictional or jurisdiction-related, and discussion of this latter issue further illustrates the inherent difficulties presented by direct district court review of a broad challenge to the INS policy under IRCA.

In its brief, the government melds three related but distinct jurisdictional concepts. The INS conduct in this case is reviewable only if it constitutes "agency action," 5 U.S.C. § 551(13) (1982), that is "final," *id.* § 704, and otherwise "ripe" for review. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Each of these requirements is designed to maintain an appropriate relationship between federal courts and administrative agencies by preventing premature judicial intervention in the administrative process. "Agency action" includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial there-

of, or failure to act." 5 U.S.C. § 551(13) (1982), *see FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980). Such action is not "final" within the meaning of section 704 of the APA, unless it represents a "definitive statement" of the agency's position. *Id.* at 241; *USAA Fed. Savings Bank v. McLaughlin*, 849 F.2d 1505, 1508 (D.C. Cir. 1988). Even "final agency action" is often unripe for review if a reviewing court is not presented with a concrete application of agency policy. The ripeness inquiry requires a court to balance "the fitness of issues for judicial decision against the hardship to parties of withholding" review. *Abbott Laboratories*, 387 U.S. at 149. Determining "fitness," in turn, generally involves consideration of several factors: how "final" is the agency action; whether the issue raised is one of law that requires no further factual development, *compare Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) *with id.* at 443-44 (Silberman, J., dissenting); whether additional administrative consideration is needed to clarify the agency's position; and whether consideration of the issue would benefit from a more concrete setting. *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986). The paradigm hardship against which the other side of the ripeness calculus is balanced has been described as " 'a dilemma for a private party who must choose between disadvantageous compliance and risking serious penalties.' " *Public Citizen Health Research Group v. Commissioner*, 740 F.2d 21, 31 (D.C. Cir. 1984) (quoting 4 K. DAVIS, ADMIN. L. TREATISE 369 (2d ed. 1983)).

We find the parties very much in disagreement as to whether the INS had actually formulated an agency policy that applied the "known to the Government" standard to section 265 cases after the INS acquiesced in the district court's interpretation of that phrase. Although the INS agreed to comply with the court's interpretation that "known to the Government" meant that a nonimmigrant qualified for legalization if he could show that the fed-

eral government as a whole had documentation that established his illegal status before 1982, the government claims it had yet determined whether a nonimmigrant could establish that status by pointing to the *absence* of a document—the quarterly report—from the INS's files.

In both the proposed intervenors' notice of points and authorities before the district court (adopted by appellees) and appellees' brief to this court, the counseling organizations claimed that INS Legalization Officers were refusing to accept applications from section 265 applicants, even after the district court's ruling of March 30 declaring the meaning of the term "Government." However, appellees conceded at oral argument—and our own review of the affidavits confirms—that, at most, *some* local INS offices were informing aliens that the office would *recommend* denial of applications based on the section 265 theory. Assuming a recommended denial by a regional INS office constitutes "agency action" under 5 U.S.C. § 551(13), it is clear that such a recommendation, let alone a prior indication that such a recommendation would be made, does not constitute *final* agency action. *See FTC v. Standard Oil Co.*, 449 U.S. at 241. For all recommended denials are referred to an adjudicator, whose decision is subsequently reviewable by the Legalization Appeals Unit (LAU), 8 C.F.R. § 245a.2 (1988), and appellees do not allege that the LAU has ever decided a case involving the section 265 issue. That only some of the INS field offices were recommending denial of section 265 claims while others were not, moreover, shows that the INS had no clear internal policy on the issue. Review of a tentative administrative position expressed by only some regional INS offices would be "at odds with fundamental notions of administrative law that generally require the agency to resolve substantive issues in the first instance." *Public Citizen*, 740 F.2d at 31.

To be sure, the original INS "known to the Government" regulation appears to have precluded section 265

claims, because, as noted above, it enumerated only four circumstances in which an alien's unlawful statute would be deemed "known to the Government." *See supra* at 3. But in their complaint, appellees never discussed the section 265 issue. Although they did vaguely allege that the INS regulation "restrict[ed] the statutory provision by enumerating the limited circumstances under which the INS is deemed to know of an alien's unlawful status," they offered no concrete case or legal theory for the district court to consider. Their only specific argument, so far as we can tell, was that "Government" must mean the entire federal Government and not merely the INS. The focus of the proceeding was the definition of "Government," not the meaning of "known." Once the district court declared the regulation invalid insofar as it defined "Government" and enjoined the agency from applying it further, the court's retention of jurisdiction and continuing "supervision" of INS's administration of the program was not an appropriate exercise of judicial power vis-a-vis the government. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978) (once court decides the precise question raised, "[i]t is neither necessary nor appropriate . . . to delineate precisely the boundaries" of the statutory provision). The INS should, at minimum, have been given the opportunity to reconsider the implications of the court's ruling for its IRCA legalization policy. *See Continental Air Lines v. CAB*, 522 F.2d 107, 125 (D.C. Cir. 1974) ("If the [agency's] position is likely to be abandoned or modified before it is actually put into effect, then its review . . . interferes with the process by which the agency is attempting to reach a final decision.").

The dissent asserts that the district court "struck down" the entire regulation as if every word was illegal, but that is not, in our view, an accurate understanding of what occurred. The district court disputed a negative implication of the regulation: that an alien could *not* show that his illegal status was known to the govern-

ment by any means *other* than the four circumstances recognized by the regulation. It was (and is) undisputed that an alien can qualify if his case falls within the scope of any of those four eventualities. There are, perhaps, an infinite number of factual patterns, other than those four, upon which an alien could rely to base a claim of "known to the Government." The district court, regardless of its sweeping language, decided only the legal issue argued before it—whether "known to the Government" was or was not limited to the INS's knowledge. The court did not thereby gain jurisdiction to decide whatever new variations could be presented on the "known to the Government" theme as if it were the administrator of the program. Since, as we have emphasized, the INS was not required to issue regulations which embodied its interpretation of the statute, it is particularly anomalous that the district court sought to extend its jurisdiction to encompass a claim as to another negative implication of the regulations that was not originally presented.

Even had appellees raised the section 265 issue before the district court at the same time as it challenged the definition of "Government" (and pointed to the regulation as "final agency action"), an anticipatory ruling on the meaning of the word "known" without a clear indication of the government's own interpretation would not have been appropriate, because the issue would not then have been ripe for review. When determining whether an issue that brings into question the propriety of an agency interpretation of a statute it enforces is ripe, we must bear in mind other principles of administrative law. The INS had never taken a position on the particular question posed by section 265 claimants: Must an alien's unlawful status be proved by the *presence* of a document in an alien's file, or is the *absence* of a document (such as a section 265 quarterly report) adequate proof? The issue apparently was not raised before the

agency during the rulemaking process, *see* 52 Fed. Reg. at 16,206, and neither appellees nor the INS was even *aware* of the section 265 theory until the proposed intervenors came on the scene in April. We see nothing in the statutory language or legislative history indicating that Congress ever considered the section 265 issue or the precise meaning of "known." *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). On its face, that statutory term certainly admits of multiple meanings, and even the district court commented on the inability of either party to "unearth any legislative materials which focus specifically and directly on the term 'unlawful status was known to the Government.'" *Ayuda*, 687 F. Supp. at 663 n.16. It should thus be evident that Congress did not "directly address the precise question at issue," *Chevron*, 467 U.S. at 843-44, and therefore the judiciary must uphold an agency decision on the matter if it is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers*, 108 S. Ct. 413, 421 (1987).

It follows, then, that when dealing with an ambiguous statutory term such as "known," a court should not interpose its own interpretation of the term *before* the agency has an opportunity to consider the issue and fix on its own statutory construction. It may well be that a court could properly conclude—faced with a concrete challenge—that Congress intended "known" to encompass something more than the four positive manifestations described in the regulation. But that conclusion surely does not necessarily carry with it a determination that knowledge could be imputed to the government based on an alien's failure to file a section 265 report. The agency should have been given an opportunity to answer that latter question before the court did. This is not a case where the agency has taken a clear position and then, in litigation, attempted to portray its policy as unsettled in order to render the dispute unripe. Rather, even though the INS regulations involved here might literally apply

to section 265 claims, it is clear that the agency had never formulated its position on that issue. We thus are not faced with a facial challenge to an agency regulation that clearly commands a particular result on this issue. *Cf. Cablevision Systems Dev. Co. v. Motion Picture Ass'n*, 836 F.2d 599, 615 (D.C. Cir.), *cert. denied*, 108 S. Ct. 2901 (1988) (although "strict adherance to the literal language" of letter by Copyright Office's General Counsel appeared contrary to law, case was unripe because the rulemaking from which the regulation grew never addressed the disputed issue, and there was "no showing of an interpretation to which the [agency] firmly adhere[d].").

It has long been recognized that an agency has primary jurisdiction to apply the law to the facts on a matter arguably within its statutory authority. *Far East Conf. v. United States*, 342 U.S. 570, 574-75 (1952); *see also Nader v. Allegheny Airlines*, 426 U.S. 290, 304-05 (1976). Although the doctrine of primary jurisdiction was originally rooted in the notion that agencies have greater expertise, experience, and flexibility than courts in dealing with regulatory matters, *see Far East Conf.*, 342 U.S. at 575, as well as in a desire for uniform application of the law, *see id.*, we have recently held that abstention in favor of agencies charged with resolving conflicting statutory policies also promotes the proper relationships between courts and administrative agencies. *National Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193 (D.C. Cir. 1986). This follows naturally from *Chevron*, which explained that deference to agencies was appropriate not only because of agency expertise but also because Congress is presumed to delegate the policy choices inherent in resolving statutory ambiguities to the agency charged with implementation of the statute. *Chevron*, 467 U.S. at 865-66; *Cablevision Systems Dev. Co.*, 836 F.2d at 608-09. To hold otherwise in this case would preclude the INS from adopting a different but permis-

sible construction of the term "known," *cf. National Republican Cong. Comm.*, 795 F.2d at 194 n.7, a result that would undermine the central tenet of *Chevron* and its progeny. *See Chevron*, 467 U.S. at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978))).

The dissent argues, however, that whatever the possible ambiguities of the term "known," it "unambiguously embraces" the claims of aliens who failed to file a section 265 quarterly report. Dissent at 42. But the district court's order itself illustrates the error in the dissent's conclusion. Supplemental Order V recognized that not all aliens who failed to file the section 265 quarterly reports slipped into unlawful status; the failure to file must also have been *willful*. *Anuda*, 687 F. Supp. at 668; *see* 8 U.S.C. § 1306(b) (1976), *amended by* 8 U.S.C. § 1306 (b) (1982). Obviously, the statute contemplated that some failures to file would not be willful and thus not grounds for deportation—for example, failures caused by hospitalization or other unusual extenuating circumstances. We do not see how the government could, before 1982, make this willfulness determination based on documentation in its files. We are therefore confident that section 245A is at least ambiguous toward the legalization claims of aliens who merely failed to file section 265 reports prior to 1982.

Going even beyond the relief ordered by the district court, the dissent reads IRCA to require the INS to grant legalization to an alien whose only transgression was an inadvertent or excused failure to file a section 265 report. Dissent at 43. This reading distorts the purposes of both section 265 and IRCA. Congress obviously did not mean to declare the status of such aliens unlawful, and provided a statutory mechanism for them to avoid depor-

tation by establishing inadvertence or excuse. Nor did it seek to grant "amnesty" and permanent resident status to aliens who were here legally and could not have been deported. The dissent raises an issue about the meaning of yet another statutory phrase—"unlawful status"—and, at most, establishes one more ambiguity which should be resolved in the first instance by the INS.

Even assuming that failure to file a section 265 report did, in itself, establish unlawful status in all cases, the "known to the Government" provision is still ambiguous as applied to section 265 claims. The dissent argues that whatever the possible ambiguities of the term "known," Congress could not have meant to distinguish between methods of proving knowledge, such as the presence or absence of a document from a government file, and there is thus no need for agency consideration of the issue. But the term "known" could have at least three separate meanings: (1) the Government *actually knew* about an alien's unlawful status; (2) the Government *should have known, i.e.*, the exercise of reasonable care would have led to actual knowledge; and (3) the Government *could have known, i.e.*, although the exercise of reasonable care alone would not have led to actual knowledge, extraordinary steps could have done so. While the presence of a document reporting an alien's illegal status would most likely result in actual knowledge of that fact by the agent of the government who receives and files the document, the mere absence of a quarterly report may well not lead to actual knowledge if all files are not monitored closely.

Even were we to agree, on first impression, that appellees' were correct that "known" included section 265 claims, we could not accept the proposed resolution because it would collapse the two discrete prongs of *Chevron* analysis into one. A court may construe an agency's organic legislation without regard to the agency's interpretation only when Congress has "directly addressed the precise question at issue." *Chevron*, 467 U.S. at 843. This

means that either the plain language of the statute must be clear, *see, e.g., Georgetown University Hospital v. Bowen*, 862 F.2d 323, 328 (D.C. Cir. 1985), or the legislative history and design of the act must illustrate a specific intent despite arguably ambiguous statutory language. *See K Mart Corp.* v. *Cartier Inc.*, 108 S. Ct. 1811, 1817 (1988). Lacking one of these situations, a court must move to step two of *Chevron* and consider whether the agency has advanced a reasonable interpretation. Even if we were able to envision an alternative construction to the one offered by appellees, we should hesitate before imposing our own. An agency may well perceive another meaning of ambiguous language which would not occur to a court that is less familiar with the intricacies of the particular regulatory field.

Be that as it may, we do not see how it can be contended at this stage that there is only one possible permissible construction of the phrase "known to the Government" in IRCA. Depending on the policies Congress had in mind when it enacted the statute, any of those definitions listed above could apply to section 245A of IRCA. Since there is no legislative history on the issue, we can only speculate from more general legislative history as to Congress' purpose.

As we earlier noted, the "known to the Government" requirement in IRCA seems odd. Only those illegal aliens whose identity and status are known—presumably the most notorious—are eligible for amnesty. Congressional concerns expressed in legislative reports accompanying IRCA reveal at least three possible reasons for this limitation on eligibility. One likely purpose was to protect against fraud in the legalization program by providing an easily administered bright-line rule. *See Ayuda*, 687 F. Supp. at 664. The legislative history also suggests, however, that an estoppel notion underlay the whole legalization program, because the large settlements of undocumented aliens were attributable to past failures of the

government properly to enforce the immigration laws. *See* H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 49 (1986). A third focus of Congress in IRCA was on the "illegal subclass now present in our society," which is characterized by a fear of imminent deportation, S. REP. NO. 132, 99th Cong., 1st Sess. 16 (1985), and it might be thought that those aliens whose illegal status is actually known to the authorities are more likely to be part of the subclass. Although we need not and should not, of course, attempt to decide which of these concerns was dominant, suffice it for us to recognize that discerning Congress' policy objective—a task delegated to the INS—will impact on the choice among the different meanings of "known" listed above.

Juxtaposed against these compelling reasons for postponing judicial intervention is the alleged hardship to appellees if deprived of a rapid clarification of "known to the Government." Although the district court did not conduct a ripeness inquiry *per se*, it found that the plaintiffs would suffer irreparable harm without an immediate ruling, because many qualified aliens would be deterred from applying for amnesty before the impending May 4, 1988 deadline. *Ayuda*, 687 F. Supp. at 665. The problem with this assertion—repeated by appellee organizations here—is that it confuses the parties who arguably have a cognizable injury redressable in district court with the parties who will suffer the alleged hardship. The *organizations* do not complain of a pressing hardship to themselves as counselors; they appear to be sliding into a representative capacity by invoking the interests of the aliens.

The difficulties faced by individual aliens, even were they a proper focus of our analysis, would be of little importance in the ripeness equation. The risk to illegal aliens of coming forward to seek legalization is inherent in their position. *Cf. Hotel and Restaurant Employees Union v. Smith*, 846 F.2d at 1518 (opinion of Silberman,

J.). Congress did, in IRCA, seek to alleviate somewhat an illegal alien's obvious difficulty in determining whether he or she qualified for legalization without revealing his or her identity by providing a mechanism whereby the alien could seek confidential advice from the QDEs. But the INS was not required to issue regulations or promulgate a policy on every possible legal theory supporting an amnesty claim, and the LAU does not issue advisory opinions. Even with advice from QDEs, some uncertainty on the part of prospective applicants is inevitable in an administrative program like this. A claimed hardship that results "not from delay in *enforcement* of an established standard, but from delay in *establishment* of a standard" is generally not a reason for prompt judicial action, *Public Citizen*, 740 F.2d at 31 (emphasis added), especially where Congress has not even required the INS to promulgate regulations defining the term "known."

* * * *

What the plaintiffs really sought from the district court was an advisory ruling on a potential theory for amnesty; with that opinion in hand, undocumented aliens could either come forward to receive their legalized status (if the theory were approved) or remain in hiding with their illegal status (if amnesty were unavailable). But the time pressures and risks to aliens involved in IRCA do not give a district court—any more than they would give a court of appeals—the power to preempt the administrative authority of the INS and direct the legalization program from the bench.

For the foregoing reasons, we conclude the district court lacked jurisdiction to issue Supplemental Order V and it is therefore

Vacated

WALD, *Chief Judge*, dissenting: I dissent from the majority's holding that the judicial review provisions of the Immigration Reform and Control Act of 1986 ("IRCA" or the "Act") deprive the district court of jurisdiction over the present action. I dissent as well from the majority's alternative refusal, on ripeness grounds, to entertain the appellees' challenge to the Immigration and Naturalization Service's ("INS") policy excluding from the IRCA legalization program nonimmigrant aliens whose unlawful status prior to 1982 stemmed from their failure to file quarterly reports with the INS as required by § 265 of the Immigration and Nationality Act ("INA"). Because I find neither of the majority's grounds a bar to jurisdiction, I also address the standing issue and find that the organizations that brought the present action have standing to do so. On the merits, I agree with the district court that the treatment of § 265 violators in 8 C.F.R. § 245a.1(d) was contrary to law.[1]

I. INTRODUCTION

In enacting IRCA, Congress sought not only to curtail illegal immigration but also to eliminate a subclass of undocumented aliens already living illegally within this country's borders. The legalization program was designed to accomplish both goals. By legitimizing aliens already resident here for a number of years, Congress wanted to free up the scarce resources of the INS to focus on prevention of new illegal entrants. Legalization was also adopted to put an end to the anomaly of longtime alien residents' being indefinitely consigned to depressed wages and working conditions because of their weak bargaining position. Congress instituted a generous amnesty program to serve both ends; it affirmatively wanted the greatest number of eligible aliens to avail themselves of the Act.

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[1] I do, however, disagree with the district court's decision on the merits in one respect. *See infra* note 19.

Recognizing, however, that an alien deciding whether to apply for legalization would fear the risk of deportation if she is ultimately found ineligible, and that many underground aliens, suspicious of authority and not yet acclimated to our culture, might be deterred by that perceived risk, Congress took special pains to encourage illegal residents to step forward during the brief 12-month "window" period in which applications were to be filed. It knew that, if left unallayed, aliens' normal mistrust and suspicion would severely hamper the legalization program's effectiveness. Consequently, Congress set up a network of community organizations to provide each potential applicant with confidential advice about her chances of becoming legalized *before* the alien submits a formal application.

This court's ruling today ignores all of that background and motivation for the amnesty program; it also distorts the plain words of the Act. The majority concludes that a direct challenge to an INS regulation, brought in district court, is an action seeking "judicial review of a determination respecting an application for adjustment of status" and that district court jurisdiction is therefore barred by 8 U.S.C. § 1255a(f)(1), which provides that such review may take place only in a federal court of appeals and only in the context of the review of a deportation order. The majority reasons that an INS-promulgated regulation constitutes "a determination respecting *an application*" because such rules "embod[y] determinations that will impact" future applications. Majority opinion ("Maj. op.,") *ante*, at 13 (emphasis added). My colleagues speculate, without any support in the text or history of the Act, that Congress adopted such a restrictive review policy to assist the INS in fending off judicial interpretations of IRCA by permitting it to litigate the validity of its regulations in each circuit, even when that would result in a checkerboard of different eligibility policies being enforced in

different parts of the country during the brief 12-month "window" period of eligibility. *Id.* at 10-13, 18-19. The majority ultimately concludes that INS regulations that illegally exclude entire categories of aliens from the legalization program cannot be challenged except through filings by individual aliens of applications certain to be rejected initially under the plain terms of the existing regulations. This runs afoul of Congress' documented intention that aliens be given as much accurate information as possible about their legalization prospects before deciding whether to submit applications. I find no basis for the majority's reading of IRCA.

Alternatively, the majority denies the availability of judicial review on the grounds of ripeness, concluding that the INS has not arrived at a final decision on the eligibility for legalization of nonimmigrant aliens whose unlawful status prior to 1982 stemmed from their failure to meet the INA § 265 requirement of filing quarterly reports with the INS. *Id.* at 34-35, 42-43. I find this holding to be totally at odds with the record in the case before us.

My reading of the text and legislative history is at one with the trial judge's: 8 U.S.C. § 1255a(f)(1)'s jurisdictional bar applies only to lawsuits that involve a court in reviewing (or undertaking for itself) the fact-finding and law-application functions that determine a specific individual's eligibility or ineligibility for legalization. While such a fact-specific lawsuit (whether filed before or after the filing of a legalization application) *would* seek "judicial review of a determination respecting an application," a suit such as the present one challenging the INS' rules on their face assuredly does *not* challenge such a "determination" and thus does not fall under IRCA's jurisdictional bar. Since 8 U.S.C. § 1255a(f)(1) does not preclude jurisdiction, the district court has its usual federal question jurisdiction to entertain a statutory or constitutional challenge to INS regulations.

28 U.S.C. § 1331(a) (federal question jurisdiction); 8 U.S.C. § 1329 (jurisdiction over "all cases arising under any of the provisions of this subchapter"); *see also* 5 U.S.C. § 701(a) (review available under the Administrative Procedure Act ("APA") unless statutes preclude judicial review or agency action is committed to agency discretion by law). This construction of IRCA is compelled not only by the language of § 1255a(f)(1) and of the subsections surrounding it but also by the background and purpose of the Act as a whole. Because Congress took special care to ensure that aliens would receive accurate advice from designated community organizations before having to decide whether to file an application, my colleagues' contention that Congress' purpose would best be served by permitting review of INS rules only in the context of individual deportation reviews long after the 12-month application period had lapsed is, to put it charitably, counterintuitive.

Similarly, the majority's position on ripeness is based on a faulty understanding of the procedural history of this case. The plaintiffs have challenged, from the outset, the INS' restrictive definition of "known" within the meaning of IRCA's requirement that an alien's pre-1982 unlawful status must have been "known to the Government." 8 U.S.C. § 1255a(a)(2)(B). The INS has had a formal policy on § 265 violators from the beginning, and it was embodied in a formal regulation that did constitute final agency action and was ripe for review.

I would also find that the organizations that brought the present lawsuit have standing to do so. The alleged injuries to them as organizations include not only "confusion" about how they should advise aliens, but also frustration of their mission of helping aliens to avail themselves of the benefits of legalization under IRCA. I consider this case controlled by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and its progeny in this court, all of which have found standing in similar situations.

On the merits, I would affirm the district court's ruling as to the inclusion of § 265 violators within the "known to the Government" category of aliens. A § 265 violator's unlawful status was "known to the Government" as of January 1, 1982, if the alien can show that his INS files do not contain the reports he was required to file under § 265. Each nonimmigrant alien had to inform the INS of any change of address, including a change of residence to a foreign country, and had to file a statement of his address for each three-month period in which he remained in the United States (even if his address were unchanged). Consequently, the INS must be deemed to have "known" of the alien's unlawful status if the alien's INS records are missing a quarterly report for a pre-1982 quarter and do not contain any record of the alien's having changed his address to another country. I therefore would affirm, in substantially all respects, the district court's Supplemental Order V.

II. IRCA's Judicial Review Provisions

IRCA provides that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section [governing applications for legalization] except in accordance with this subsection." 8 U.S.C. § 1255a(f)(1). The subsection authorizes the establishment of a single level of administrative appellate review of legalization applications, *id.* § 1255a(f)(3)(A), and provides that "[t]here shall be judicial review of such a denial [of adjustment of status] only in the judicial review of an order of deportation under [§ 106 of the INA]." *Id.* § 1255a(f)(4)(A). Section 106 of the INA provides that judicial review of deportation orders can take place only in U.S. Courts of Appeals after the alien has exhausted his administrative remedies. *See* 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(a) (review in courts of appeals); 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(c) (exhaustion of remedies). These appellees obviously do not challenge any deportation

orders; rather, they brought this action in district court to invalidate the INS rule excluding § 265 violators from the pool of aliens eligible for legalization. The crux of my disagreement with the majority is that I do not view the present action as seeking "judicial review of a determination respecting an application for adjustment of status" at all, and so I do not find it comes within the bar of § 1255a. That section on its face does not apply to this suit and was conceived for a different purpose altogether.

A. *Language, Structure and Background of the Statute*

Either a rulemaking *is* "a determination respecting an application" or it is *not*. If, as I maintain, a rulemaking is *not*, in itself, "a determination respecting an application," then the jurisdiction preclusion provision of 8 U.S.C. § 1255a(f)(1) simply does not apply to this case; IRCA's bar to district court judicial review attaches only to "a determination respecting an application."

If, on the other hand, as the majority seems to say, Maj. op. at 13, a rulemaking *is* "a determination respecting an application," then several anomalies are presented by the statutory scheme, none of which is adequately explained by the majority. First, there is the obvious linguistic difficulty in stretching the term "a determination respecting an application" to cover the promulgation of general rules. Second, interpreting "a determination respecting an application" to encompass rules compels the odd conclusion that the administrative appellate review board set up under IRCA actually has the power to entertain a facial attack on the validity of a regulation promulgated by the Attorney General. Third, the majority's reliance on the word "respecting" to explain the broad reach of "a determination respecting an application" is undermined by Congress' interchangeable use of that phrase with "the determination *on* the application." Against the background of a normal pre-

sumption in favor of reviewability of agency rulemaking, Congress' decision to preclude jurisdiction only over "a determination respecting an application" must be seen as a conscious decision not to preclude preenforcement review of rules.

I begin with the language of the allegedly exclusionary section itself. The words "application for adjustment of status" clearly describe a written document submitted by a particular alien applicant for a change of his status. Consistent with this view, other provisions of IRCA inform us that an "application[] for adjustment of status" is a concrete piece of paper that "may be filed" with various entities, 8 U.S.C. § 1255a(c)(1), may be "forward[ed]" by those entities to the Attorney General, *id.* § 1255a(c)(3), and must "contain" certain information. *Id.* § 1255a(a)(1)(C). The majority conveniently ignores this everyday meaning of "an application" by stressing instead the words surrounding it: "review of *a determination respecting an application.*" *Id.* § 1255a(f)(1) (emphasis added). To the ordinary reader, however, this phrase too appears to cover only the determinations that are made with respect to each application: rulings that go into an ultimate determination of whether a particular application is approved or disapproved. The majority, however, places the entire weight of its argument on the word "respecting," which it interprets to encompass anything having any relation to or impact on any legalization applications present or future. I find that reading overbroad and misguided; the context of the phrase "respecting an application" conveys an altogether different meaning: *i.e.*, that a review of any aspect of an individual's application must be channeled through the deportation proceeding. Note that Congress did not say that "any *claim arising under* the legalization program," nor that "any *action taken or decision made* with respect to the legalization program" must be so channeled. Rather, the preclusion provision of § 1255a(f) is ad-

dressed only to "a *determination* respecting an *application.*" 8 U.S.C. § 1255a(f)(1) (emphasis added).

The entire subsection dealing with administrative and judicial review, of which § 1255a(f)(1) is a part, makes clear that Congress used the phrase "a determination respecting an application" as a catch-all for any and all aspects of an individual's petition—*i.e.*, ascertaining the facts of the individual's case and applying the law to those facts. The Act requires the Attorney General to establish "a single level of administrative appellate review of *a determination described in paragraph (1).*" § 1255a(f)(3)(A) (emphasis added). Such review shall be based solely "upon the administrative record established at the time of *the determination on the application*" and upon newly-discovered evidence that was unavailable "at the time of *the determination.*" § 1255a(f)(3)(B) (emphasis added).

None of these provisions dealing with administrative appellate review makes sense if, as the majority insists, the promulgation of a general rule concerning eligibility for legalization is also construed as a "determination described in" § 1255a(f)(1). *See* Maj. op., *ante*, at 13. Certainly Congress did not envision that the Legalization Appeals Unit of the INS (the "LAU") would undertake administrative review of the Attorney General's regulations. Yet that must follow if a regulation is "a determination described in" § 1255a(f)(1), as the majority insists it is. The majority contends that there is nothing odd or unusual about administrative review of rulemaking, nor about a requirement that a challenge to a rule be *raised* first before the LAU; they argue that, while the LAU probably would be bound by the Attorney General's regulations, the LAU would be free to *interpret* the regulations in such a way as to avoid any conflict with the statute. Maj. op., *ante*, at 14. Even if that were true (I remain skeptical), other consequences of the majority's position are more ominous. If, for instance, the

majority's view is correct, then § 1255a(f)(3) does not merely authorize aliens whose applications have been denied to *raise* a challenge to a rule before the LAU and receive a saving *interpretation* of that rule. The majority's reading of "a determination respecting an application" compels a far stranger result: the issuance of the rule itself would be "a determination," and the LAU would be empowered to conduct "administrative appellate review of [that] determination"—that is, appellate review of the rule's facial validity. 8 U.S.C. § 1255a(f)(3)(A). In short, if the majority wants to stretch the term "a determination respecting an application" to bar district court jurisdiction over the present case, it must explain the absurd consequence of empowering an administrative appellate review board to strike down the Attorney General's regulations.

The majority denies that its reading of the Act would empower the LAU to entertain a *facial* challenge to a regulation, because the LAU can only hear cases involving challenges to the INS' disposition of individual legalization applications. Maj. op., *ante*, at 14 n.7. The majority grounds this argument on the premise that Congress attached entirely different meanings to the § 1255a(f)(1) phrase "a determination *respecting* an application" and the § 1255a(f)(3)(B) phrase "the determination *on* the application." 8 U.S.C. § 1255a(f) (emphasis added). Yet subsection (f)(3) clearly uses the two terms interchangeably.[2] Either both terms encompass rulemak-

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[2] A reading of 8 U.S.C. § 1255a(f)(3) illustrates Congress' interchangeable use of the two terms. Paragraph (3)(A) establishes administrative appellate review of "a determination described in paragraph (1)," which is the paragraph containing the term "a determination *respecting* an application for adjustment of status." *Id.* § 1255a(f)(3)(A), (f)(1) (emphasis added). Paragraph (3)(B) states that "[*s*]*uch* administrative appellate review"— signalling by the word "such" that the review is of a "determination *respecting* an application"—shall be based on the administrative record "established at the time of the determination *on* the applica-

ing as well as adjudication—in which case the majority's strained reading of IRCA results in the LAU being given the power to entertain facial challenges to regulations—or neither term encompasses rulemaking within its scope—in which case the preclusion provision of 8 U.S.C. § 1255a(f)(1) is no bar to district court jurisdiction over the present case. The majority cannot have it both ways.

On the basis of an all-embracing definition of the word "respecting," my colleagues wipe away the general presumption of reviewability of agency rulemaking. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967) (preenforcement review of regulations is available, so long as ripeness standards are met, unless "there is persuasive reason to believe" Congress intended to cut off review); *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (rejecting suggestion "that a detailed scheme of administrative adjudication impliedly precludes preenforcement judicial review of rules"). Yet Congress gave no indication it

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tion." *Id.* § 1255a(f)(3)(B) (emphasis added). In short, Congress provided for review of a determination "respecting" an application, based on the record established at the time of the determination "or" the application.

The majority contends that the words "respecting" and "on" signal that the statute is referring to *different determinations*. Thus, the majority argues, paragraph (f)(3)(A) establishes administrative appellate review of rulemaking and adjudication alike, while under paragraph (f)(3)(B) such review can take place only after an adjudication. Maj. op., *ante*, at 13 n.6, 14 n.7. Yet a common-sense reading of (f)(3)(A) and (f)(3)(B) together indicates that the (B) term refers to the *same determination* as the (A) term does. This reading is underscored by the use of the definite article in the second reference: "*the* determination on *the* application." *Id.* (emphasis added). The juxtaposition of the two phrases, coupled with the use of the word "the" to indicate that the same determination and the same application are being referred to, compel the conclusion that Congress saw no difference between a determination "respecting" an application and a determination "on" an application: neither phrase encompasses rulemaking.

envisioned any such drastic curtailment here, although it knows well how to excise normal review procedures when it puts its mind to it. Thus, for example, where Congress intended to foreclose review of all rulemakings and adjudications of the Veterans' Administration, it provided that "the decisions of the Administrator *on any question of law or fact under any law administered by the Veterans' Administration providing benefits* for veterans and their dependents or survivors" would be immune to review. 38 U.S.C. § 211(a) (emphasis added). That kind of preclusion clause obviously would apply to, *inter alia*, suits alleging that V.A. regulations were based on an impermissible interpretation of a benefits statute. *See Traynor v. Turnage*, 108 S. Ct. 1372, 1379-80 (1988).[3] In IRCA, by contrast, Congress did not apply its exclusive review procedure to any "decision of the Attorney General on any question of law or fact under IRCA," but only to "a determination respecting an application for adjustment of status."

The location of the judicial review provision within the structure of the Act also bolsters a more limited interpretation of § 1255a(f)(1)'s intended effect. It follows immediately after several subsections dealing with adjudication of applications; the general rulemaking authority under which the challenged INS regulation was promulgated appears in the following subsection, which has no review provisions in it. 8 U.S.C. § 1255a(g). Were the structure otherwise—with the limits on judicial review following the sections authorizing adjudications and rulemaking—the majority's reading of the Act would be more plausible. But the actual sequence strongly sug-

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[3] The Supreme Court there held that the preclusion was inapplicable to the declaratory judgment action in *Traynor v. Turnage* not because the action challenged regulations, but because it challenged those regulations as being inconsistent with a federal statute other than a "law administered by the Veterans' Administration providing benefits." 108 S. Ct. at 1379-80.

gests that only review of individual applications, not rulemaking, is limited by § 1255a(f).[4]

B. *Legislative History and Statutory Purpose*

Certainly the ordinary meaning of the text does not permit a conclusion that INS regulations are immunized from the normal avenues of challenge in district court.

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[4] The majority argues that permitting a district court to review an INS rulemaking would circumvent § 1255a(f)(4)(B)'s scope-of-review provision. A court of appeals reviewing a legalization denial in the course of deportation order review must apply an "abuse of discretion" standard of review to the "determinations contained in [the administrative] record," *id.*; the majority fears that district court review of rulemaking would permit an end run around that restrictive standard. But this argument relies on what even the majority admits is a slender distinction—the difference between the "abuse of discretion" standard and the standard enunciated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)—*i.e.*, that an agency's interpretation of ambiguous statutory language must be upheld unless it is unreasonable or manifestly contrary to the statutory purpose. The majority acknowledges that it "may well be" that the two standards "would not differ markedly." Maj. op., *ante*, at 9 n.2.

To the extent that the abuse of discretion standard is more deferential than *Chevron*, it would be unprecedented to apply such a super-deferential standard to the question of whether an agency's regulations comport with its statutory mandate. *Cf.* 2 S. Childress & M. Davis, *Standards of Review* § 17.2 at 335-36 (1986) (citing *Chevron* as representing the most deferential end of the spectrum in review of agency statutory interpretation); 2 C. Koch, *Administrative Law and Practice* § 9.13 at supp. 40 (1985 & Supp. 1987) (agency rules that fill in gaps left in legislation merit "rather strict judicial scrutiny even though it is sometimes identified as discretion"). Nor has the majority offered any example of abuse-of-discretion review of agency rulemaking. I therefore think it unlikely that INS regulations are among the determinations contained in [the administrative] record" to which the abuse of discretion standard applies. 8 U.S.C. § 1255a(f)(4)(B).

Furthermore, IRCA's legislative history contains no evidence at all that this is so: quite the contrary.

The majority spends little time on the Act's legislative history. Instead, it propounds a circular argument. It assumes (not proves) that Congress intended to preclude district court jurisdiction over this case, and comes up with a packet of its own reasons why. Then, it goes on to conclude stunningly that this court cannot flout the will of Congress by holding otherwise. *See* Maj. op., *ante*, at 10-13, 18-19.

Thus my colleagues argue that an action seeking a speedy judicial determination of the validity of an INS rule would defeat Congress' imputed intent to have such determinations made piecemeal, by different circuit courts of appeals, in challenges to deportation orders. *See* Maj. op., *ante*, at 10-13. Congress—they say—must not have cared about intercircuit splits and even intracircuit nonacquiescence despite its attendant legal uncertainties and nonuniform practices for the acknowledged "long time" before the Supreme Court eventually settled key questions about eligibility standards. *Id.* at 11 n.4, 18-19. According to the majority, Congress was content to let the INS pursue its chosen policies in as many jurisdictions as possible for as long as possible despite contrary judicial rulings. The problem with this ingenious interpretation of Congress' intent is that the majority can point to absolutely no evidence whatsoever that Congress in fact valued nonuniformity, uncertainty and slowness in getting major legalization questions settled. The majority merely infers that intent from the fact that those consequences would follow *if § 1255a(f) were construed as precluding district court jurisdiction over this action.* The majority's "evidence" of congressional intent on this issue is nothing but a creature of its own conjuring.[5]

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[5] The majority infers that Congress intended rulemaking review to go court-by-court because "it placed review of

1. *Congress' Adoption of the House Provision on Judicial Review*

The majority proffers only one argument based on IRCA's legislative history. My colleagues say that, since the Senate conferees abandoned a strict Senate provision precluding all judicial review of all aspects of the legalization program and acceded to the House provision allowing a narrowly-channeled judicial review procedure for adjudications, it is unlikely that the Senators meant to permit independent district court review of rulemaking as well. *See* Maj. op., *ante*, at 19-20. The rejected Senate version would have precluded review of any "decision or determination under this section." S. 1200, 99th Cong., 1st Sess. § 202(f)(1) (1985). Since "this section" in that bill included a provision authorizing the Attorney General to promulgate regulations necessary for the legalization program, *id.* § 202(g)(1), the Senate restriction would clearly have precluded review of rulemaking as well as adjudication.[6] That scenario suggests,

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agency action in the courts of appeals." Maj. op., *ante*, at 18. It is, of course, uncontested that review of agency *adjudication* was placed exclusively in the courts of appeals, because the Act incontestably says so. On the other hand, whether the same statutory language applies to all "agency action," including *rulemaking*, is distinctly not clear from the text. Moreover, the interests of certainty and uniformity apply with much greater force to review of rules than to review of adjudications. The INS regulations were required to be publicized widely, and they are broadly applicable to large categories of aliens. As is discussed, *infra*, Congress also established a network of community service agencies to advise aliens about the rules and about their individual chances of legalization. From the fact that Congress was willing to tolerate circuit splits on the narrow, fact-specific questions arising in adjudications, it should not be inferred absent statutory text or legislative history to support such an inference that Congress also intended the same uncertainty to dog the validity of the eligibility criteria themselves.

[6] The Senate report accompanying S. 1200 lends support to this view, by stating that the preclusion attaches to "a de-

however, quite a different conclusion from the panel's: when the Senate agreed to House language which, on its face, limited only the judicial review procedure for determinations respecting applications, it must be assumed to have known that it was receding from a broadly worded preclusion to a much narrower one, and to have consciously made that choice. This bit of history in fact adds to the credibility of my interpretation that § 1255a(f)(1) bars judicial review outside of deportation proceedings only of determinations about specific legalization applications.[7]

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cision or determination made with respect to *the legalization program*." S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added).

[7] In its competing scenario, the majority treats as crucial a statement made by Senator Cranston during a 1983 floor debate over an immigration reform bill that ultimately was fatally stalled in conference in the 98th Congress. *See* Maj. op., *ante*, at 19-20. Senator Cranston advocated a judicial review amendment to the bill then under discussion, S. 529; his amendment would have "merely permit[ted]" a "very limited form of judicial review" that "would [have been] available only when an improper denial of legalization is raised as a defense in a deportation proceeding already subject to judicial review." 129 Cong. Rec. 12,810 (1983); *see* Maj. op., *ante*, at 19-20. Contrary to the impression conveyed by the majority's reference to it, Senator Cranston's amendment differed significantly from the provision ultimately enacted by the 99th Congress. His amendment carved out one exception to a draft provision that precluded review of any "decision or determination made by the Attorney General under this section"; since "this section" included rulemaking authority, preenforcement review of rules was excluded. S. 529, 98th Cong., 1st Sess., § 301(g)(1), (f) (1983) (as reported). While carving out a single exception for deportation proceedings, Senator Cranston's proposed amendment would have left § 301(g)(1) otherwise intact, which explains why his remarks assumed the unavailability of preenforcement review of rules. *See* 129 Cong. Rec. 12,810 (text of proposed amendment). By contrast, the conference committee compromise that was ultimately enacted into law in 1986

Indeed, there is further evidence that the Senate understood the term "determination respecting an application for adjustment of status" to mean an adjudication. The Senate bill had also limited applicants to a single level of administrative appellate review "of a final determination respecting an application for adjustment of status." S. 1200, *supra*, § 202(f)(4). Like the House version ultimately adopted, such review would be based solely upon "the administrative record established at the time of the determination on the application." *Id.* That Senate bill provision, however, was in addition to the one earlier discussed, in the same bill, which precluded review of any "decision or determination under this section." *Id.* § 202(f)(1). Thus, when the Senate dropped its comprehensive preclusion and agreed to retain only the more limited one involving "determination[s] respecting an application," it must surely have known that the abandonment would have some effect—*i.e.*, ordinary agency rulemaking review would continue outside of the adjudication format.

2. *Purpose of the Judicial Review Provisions*

The majority misreads IRCA's legislative history in two basic ways. First, it concludes, surprisingly, that Congress' purpose in providing so narrow a channel for judicial review was to afford the INS more leeway in fending off adverse decisions by the federal judiciary, presumably even at the expense of substantial delays and disruption of the operation of the legalization program. *See* Maj. op., *ante*, at 10-13, 18-19. I find that interpretation of Congress' purpose most extraordinary. My reading suggests the opposite, that Congress' primary reason for limiting judicial review of adjudications was

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(fully three years after Senator Cranston's remarks) *changed the wording of the preclusion provision*: the Senate dropped its broadly worded version precluding review of any "decision or determination under this section" and acceded to the House version containing the "determination respecting an application" language now at issue.

to *prevent* delays and uncertainty. The Senate report explained that purpose as follows:

> The Committee is concerned that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to *delay* the final determinations of their applications. This would prevent not only their own deportation but *the expeditious operation of the program for others.*
>
> It is for the purpose of helping to insure *reasonably prompt final determinations* that subsection (f) provides that there will be no judicial review of a decision or determination made with respect to the legalization program.

S. Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis added). As noted above, IRCA as enacted retreated from the total review preclusion of the Senate version. The Senate report does, however, illustrate the true underlying purpose for Congress' decision to restrict judicial review.

The language and legislative history of IRCA indicate that what Congress really intended by the preclusion section was to foreclose aliens from flooding the courts with suits seeking premature review of individual applications—*i.e.*, review of the INS' determination of the facts of each case and its application of the law to those facts before deportation hearings were concluded. Congress legislated against a background in which individual aliens were often permitted to bring actions in district court—long before the start of deportation proceedings—seeking declaratory or injunctive relief to redress the INS' disposition of their various applications and petitions under the immigration laws. *See, e.g., Navarro v. District Director*, 574 F.2d 379, 383 (7th Cir.) (review of denial of adjustment of status), *cert. denied*, 439 U.S. 861 (1978); *Acupuncture Center of Washington v. Dunlop*, 543 F.2d 852 (D.C. Cir.) (review of denial of labor certification), *cert. denied*, 429 U.S.

818 (1976). In enacting IRCA's provision barring pre-deportation-order review of "a determination respecting an application for adjustment of status under this section," 8 U.S.C. § 1255a(f)(1), Congress obviously decided to create, for the IRCA legalization program, a narrow channel for judicial review of the INS' factfinding and law-application functions. The exercise of jurisdiction over this case is in no way inconsistent with that goal.

While partial insulation of the INS' adjudication actions from scattershot judicial review was a logical means to the end of finality, speed, and the smooth operation of the system, *cf.* Maj. op., *ante*, at 10-13, 18-19, it is intuitively implausible to attribute to Congress a conscious desire to spur the INS on to fight any major rule challenge to the bitter end in each of a dozen circuits. The best evidence of what Congress did want goes in exactly the opposite direction. *See Traynor v. Turnage*, 108 S. Ct. 1372, 1379 (1988) (finding no bar to judicial review of certain decisions of the Veterans' Administration, noting that "[p]ermitting these cases to go forward will not undermine the purposes of" the review-preclusion provision). As the majority itself acknowledges, a suit such as this one directly challenging INS rules is by far the superior vehicle to achieve a swift and decisive resolution of the law nationwide without the need for ultimate settlements of intercircuit conflict by the Supreme Court itself, followed by reopening of thousands of appeals in the courts whose views are rejected. Maj. op., *ante*, at 10-13. My interpretation of § 1255a(f) as allowing direct review of rules, coupled with limited judicial review of individual adjudications, is the most consistent method of accomplishing what Congress clearly intended.

3. *Purpose of the Legalization Program Generally*

The majority also fails to consider the judicial review provisions in the context of the entire legalization scheme. It reduces the legalization program to merely

"part of a legislative compromise" necessary to engineer passage of the statute's main goal of penalizing employers who hire illegal aliens. *Id.* at 2. Thus—the majority argues—Congress would not likely have worried about an individual alien's fear that coming forward in order to challenge an invalid INS rule denying him eligibility would entail a risk of deportation. *See id.* at 42-43.

My colleagues' dismissal of the legalization component of the bill is inaccurate, as a careful reading of the history will show. Congress saw legalization as one of the central components of immigration reform. *See* H.R. Rep. No. 682, pt. 1, 99th Cong., 2d Sess. 49 (1986) (legalization is "an essential part of any immigration reform legislation"). Legalization had always been a critical feature (along with employer sanctions and improved border control) of immigration reform proposals advanced by the Ford, Carter and Reagan administrations and debated by Congress for over a decade. *See* S. Rep. No. 132, 99th Cong., 1st Sess. 20-24 (1985); H.R. Rep. No. 682, pt. 1, *supra*, at 53-56; *see also id.* at 103 (employer sanctions and legalization are the "core elements" of the Reagan administration program) (quoting Attorney General Edwin Meese, III). Legalization was motivated in part by the belief that long-standing resident aliens deserved it,[8] but there were more pragmatic concerns as well. First, legalization would enable the INS to focus its resources on the illegal entry of new aliens, thereby giving the United States more "enforcement for its dollar." S. Rep. No. 132, *supra*, at 16; *see* H.R. Rep. No. 682, pt. 1, *supra*, at 49. Second, legalization would "eliminate the illegal subclass now present in our society," whose members' weak bargaining position (stemming from their illegal status) was eroding U.S. wages and working conditions. S. Rep. No. 132, *supra*,

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[8] *See, e.g.*, H.R. Rep. No. 682, pt. 1, *supra*, at 49.

at 16; *see* H.R. Rep. No. 682, pt. 1, *supra*, at 49. To be effective in those goals, however, the legalization program had to attract a large majority of the approximately one million illegal aliens estimated to be eligible. *See* S. Rep. No. 132, *supra*, at 64 (estimate based on proposed 1980 cutoff date, rather than 1982 date adopted in IRCA). To this end, Congress intended a "generous program" that would be "implemented in a liberal and generous fashion" to "ensure true resolution of the problem and . . . ensure that the program [would] be a one-time-only program." H.R. Rep. No. 682, pt. 1, *supra*, at 49, 72.

Congress naturally recognized that illegal aliens would initially be suspicious of any amnesty program. A plethora of witnesses told them so, if they had not known it already. *See, e.g., Immigration Reform and Control Act: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 783, 789 (1983) (satement of Dale DeHaan, American Council for Voluntary Agencies); *id.* at 844-45, 855-56 (statement of John Huerta, Mexican American Legal Defense and Education Fund). Because failure to apply on the part of a significant number of aliens could defeat a major purpose of the bill, Congress took special steps to encourage apprehensive aliens to come out of the shadows and apply for an adjustment of status. It required the Attorney General to widely disseminate information about the legalization program and the requirements for obtaining adjustment of status. 8 U.S.C. § 1255a(i); H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 93 (1986). Congress also told the Attorney General to name as "qualified designated entities" ("QDEs") community organizations with whom the aliens had friendly relations to advise and assist them in the preparation of applications. *Id.* § 1255a (c)(2). A QDE could forward an application to the Attorney General only if authorized by the applicant to do so, *id.* § 1255a(c)(3), and even more important, the Attorney General and the INS could not obtain access

to any alien's QDE file without that alien's consent. *Id.* § 1255a(c)(4). The QDEs were to be honest counselors for suspicious aliens. If an alien seeking their help found she was not eligible, she would not automatically be reported to the INS.

Congress fashioned such unusual measures in response to legislators' expressed concern about a "low rate of participation among the eligible candidates."

> At least part of the reason is distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. . . . The confidentiality of the records [of QDEs] is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS.

H.R. Rep. No. 682, pt. 1, *supra*, at 73. *See also* S. Rep. No. 312, *supra*, at 47 (QDEs provision aims "to assure applicants that they may apply to such entities without fearing that their applications will be forwarded to the INS even if in the view of such entities they do not qualify for legalization"). Senator Simpson, IRCA's main sponsor in the Senate, acknowledged that the program could work only if it were widely publicized in such a way as to overcome aliens' natural distrust. In a speech on the Senate floor urging the adoption of the Conference version, he stated:

> So when they legalize they will have to know, as that call goes out, that this legalization period is existent, that they must come forward because this is the last call. This is the first call, and the last call, a one-shot deal. Come on out. Go to your church. We are not trying to fool you this time.

132 Cong. Rec. S16888 (daily ed. Oct. 17, 1986).

Congress then provided for a one-time-only legalization program with a 12-month "window" period for filing applications. For the program to work, literally hundreds of thousands of aliens had to be induced to come forward and find out if they were eligible during that brief period. They had to be given the correct information about legalization requirements if the maximum number were to apply. By providing for a network of QDEs, Congress meant to permit aliens unsure of their status to step forward *tentatively*, obtain accurate and confidential advice about legalization, and *only then* decide whether to submit an application to the INS.

In light of this carefully crafted scheme, the majority's tortured reading of 8 U.S.C. § 1255a(f)(1) to deny any avenue for challenging INS rules restricting eligibility except through individual aliens' applications is untenable. An illegal alien told that he is ineligible under INS regulations must decide which regulations may be unauthorized and step forward to submit his application anyway and become a test-case. And not just one such courageous act would be required; all aliens wishing to avail themselves of the benefits of a ruling against the regulation must submit applications to the INS. They would not be allowed to wait on the sidelines until the first test case came to closure since the window period was only 12 months long and judicial review of the first wave of applications would almost certainly not take place until long after the 12-month period had lapsed. Although the majority dismisses the aliens' understandable fear of the INS as being "inherent in their position," Maj. op., *ante*, at 42, the fact is that Congress made one of IRCA's chief purposes the diminution of that fear. A Congress expressly desirous of seeing that aliens are accurately advised of their eligibility for legalization would hardly choose the course the majority stakes out. Certainly it is presumptuous to impute to that Congress such a scheme, as the majority does, when it runs counter

to all the signals Congress actually sent, yields a harvest of distrust and subverts the major goals of the Act. It makes infinitely more sense to assume that in the absence of any specific bar, Congress meant to keep in place the ordinary avenues of direct review for eligibility regulations so that egregious misinterpretations could be quickly corrected for all aliens in all jurisdictions before the 12-month period for applications ran out. That intent was at the base of the district court's restricted interpretation of § 1255a(f)(1), and I agree with it.

C. *Prior Cases*

The majority's flamboyant reading of § 1255a(f) is also out of step with the rulings of other federal courts. It is at odds with three sister circuits' interpretation of § 106 of the INA, which governs review of deportation orders. IRCA's judicial review provision for denials of legalization applications requires that such review take place only in the course of § 106 deportation proceedings. Section 106, in turn, has its own "sole and exclusive procedure for[] the judicial review of all final orders of deportation," 8 U.S.C. § 1105a(a), and "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him." *Id.* § 1105a(c). Notwithstanding that language, three circuit courts have held that challenges to official INS policy—whether in the form of regulations or of an officially approved program, pattern or scheme followed by immigration officials and approved by those in charge—can be directly attacked in a district court proceeding brought against the agency. *See Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986) (challenge to validity of regulations and to the INS' application of them in denying plaintiffs' applications for asylum); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984) (en banc) (challenge to an INS policy of detaining aliens pending disposition of their petitions for asylum, as being discriminatory and as having

been adopted without notice and comment), *aff'd*, 472 U.S. 846 (1985) (expressing no view on jurisdictional issues); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982) (challenge to an alleged INS program of unlawfully discriminatory treatment of Haitians' petitions for asylum). Four district courts have already extended the logic of those cases to the judicial review provisions of IRCA. *See Doe v. Nelson*, 703 F. Supp. 713, 720-22 (N.D. Ill. 1988); *Immigration Assistance Project v. INS*, No. C88-379R, slip op. at 10-11 (W.D. Wash. Nov. 2, 1988); *Haitian Refugee Center v. Nelson*, 694 F. Supp. 864, 873-74 (S.D. Fla. 1988); *Zambrano v. INS*, No. S-88-455, slip op. at 6-7 (E.D. Cal. Aug. 9, 1988).

The majority evidently believes that these courts have all misinterpreted § 106 of the INA and § 1255a of IRCA, and cites other cases in support of its restrictive approach to both sections: *Foti v. INS*, 375 U.S. 217 (1963), and *INS v. Chadha*, 462 U.S. 919 (1983). In *Foti*, an alien appearing at a deportation hearing conceded his deportability and requested discretionary relief, in the form of a suspension of deportation, which was denied. He was granted the right to voluntary departure at his own expense, but that grant was coupled with a contingent deportation order directing that he be deported if he failed to depart voluntarily within the prescribed time. 375 U.S. at 219 n.1. The Court held that review of a denial of suspension of deportation fell within the court of appeals' exclusive jurisdiction under § 106, since the statutory term "final orders of deportation" included "all determinations made during and incident to the administrative proceeding conducted by a special inquiry office and reviewable together by the Board of Immigration Appeals." *Id.* at 229. In *Chadha*, an alien was granted a suspension of deportation but the House of Representatives vetoed the suspension; the alien was then ordered deported. The Court held that the alien's

constitutional challenge to the statute authorizing the one-house veto fell within the jurisdiction of the court of appeals under § 106. The Court held that "the term 'final orders' in § 106(a) 'includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.'" 462 U.S. at 937-38 (quoting *INS v. Chadha*, 634 F.2d 408, 423 (9th Cir. 1980)).

In both *Foti* and *Chadha*, the alien seeking court of appeals review was subject to an outstanding final order of deportation. *Foti*, 375 U.S. at 219 n.1; *Chadha*, 462 U.S. at 928. Thus, both were primarily seeking "judicial review of [a] final order[] of deportation." 8 U.S.C. § 1105a(a). The Supreme Court predictably held that an alien *who is subject to a final order of deportation* can challenge all matters on which the validity *of that final order* is contingent in his appeal of the order under § 106; those other matters are "included" or "encompassed" within the term "final order[]." This is quite different, however, from a holding that under no circumstances can the legality, or presumably even the constitutionality, of INS regulations or policies be directly challenged outside the § 106 procedure. The Supreme Court did not intimate any view in either *Foti* or *Chadha* as to whether the exclusivity feature of § 106 attaches not only to the actual deportation process itself, but also to matters which the individual might conceivably raise in such a deportation proceeding. The circuits are presently divided on the issue; ours has not yet chosen sides. *Compare Jaa v. INS*, 779 F.2d 569, 571 (9th Cir. 1986) (denial of application for adjustment of status reviewable in district court) *with Kashani v. Nelson*, 793 F.2d 818, 826-27 (7th Cir.) (denial of application for asylum not reviewable in district court but must be renewed in deportation proceeding), *cert. denied*, 107 S. Ct. 644 (1986). *Compare Hotel & Restaurant Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1506

(D.C. Cir. 1988) (en banc) (equally divided court) (exhaustion requirement of § 106 does not apply to "general challenge to the INS' entire framework for processing [asylum] applications") (opinion of Mikva, J.) *with id.* at 1518-19 (stating, without deciding, that "it is likely that a denial of asylum is appealable under the APA") (opinion of Silberman, J.). In short, this court has not yet decided whether an individual alien could bring a direct, district court challenge to a denial of asylum or denial of adjustment of status; moreover, there is no precedent in any circuit for the proposition that § 106 bars a suit challenging a regulation or agency-wide practice on statutory or constitutional grounds, and at least one case goes the other way. In sum, none of the panel's § 106 case citations offers any meaningful support for my colleagues' interpretation of § 1255a(f)(1).

The majority also analogizes this case to *Heckler v. Ringer*, 466 U.S. 602 (1984), involving appeals under the Medicare Act. In that case, plaintiff Ringer sued in district court for a declaratory judgment invalidating a ruling of the Secretary of Health and Human Services that precluded Medicare reimbursement for a particular surgical procedure. Judicial review of "any claim arising under" the Medicare Act is available only after a claimant undergoes the procedure, seeks payment and exhausts administrative remedies. Ringer, who wished to undergo the procedure but said he could not do so without assurance of repayment, argued that he did not yet have a "claim" and so the exhaustion requirement did not apply to him. The Supreme Court rejected Ringer's arguments, holding that he was "clearly seeking to establish a right to future payments should he ultimately decide to proceed" with the surgery, and that his lawsuit was therefore a "claim arising under" the Medicare Act within the meaning of the jurisdiction-preclusion provision. 466 U.S. at 621. The majority contends that IRCA, like Medicare, provides only one defined channel for judi-

cial review—in this case, a legalization application—and that all other fronts of attack on agency policy are prohibited. If Ringer's challenge was a "claim arising under" the Medicare Act, the majority believes, then the present action seeks "judicial review of a determination respecting an application" for legalization.

Ringer of course presents a very different fact situation and arises under a very different statute than IRCA. The Court held that Ringer's cause of action—namely, that the Secretary's ruling barring reimbursement for a certain medical procedure was invalid under the Medicare Act—constituted a "claim arising under" the Act and must be pursued as such. *Ringer* cannot, however, be stretched out of its own shape to say that the claim here —that the INS' eligibility rules are invalid under IRCA—is an action seeking "judicial review of a determination respecting an application" for legalization. Unlike the Medicare Act, IRCA nowhere attempts to define and prescribe the method of review for all "claims arising under" the Act. Indeed, as we discussed, Congress rejected a Senate proposal that would have done just that. Congress in IRCA merely laid down a single uniform procedure for judicial review of "a determination respecting an application" for legalization. The word "application" as used in IRCA denotes the written document that is filed by the alien. IRCA said nothing at all about similarly regulating challenges to other kinds of agency actions. Far from providing a model for how IRCA should be construed, the Medicare Act illustrates that Congress knows how to draft a comprehensive jurisdiction-preclusion provision when it wants to.

The background and purposes of the two Acts, moreover, could not be more disparate. Congress, in enacting IRCA, set up a one-shot finite-period crash program to legalize undocumented aliens. It was intent on making sure those undocumented aliens would not be deterred from filing for legalization due to uncertainty about the

rules; it created the QDEs for that purpose and mandated that accurate information about the program be broadly disseminated. In IRCA, aliens were encouraged to come forward on a confidential basis to obtain advice about legalization eligibility from the QDEs; only then need they decide whether to present a concrete claim for legalization. To the extent that uniformity of interpretation of eligibility requirements and prompt correction of erroneous administrative rulings can be achieved by direct judicial review of key INS regulations, Congress' aim will be enhanced, not denigrated. In the Medicare Act, by contrast, Congress had no reason to fear applicants would not file claims for reimbursement; in fact, it sought to establish a permanent scheme for the orderly processing of anticipated millions of claims every year; for that purpose, it "set up a scheme that requires the presentation of a concrete claim to the Secretary." *Ringer*, 466 U.S. at 625. The Medicare Act, according to the *Ringer* Court, was intent on balancing the individual hardship caused by uncertainty as to reimbursability "against the potential for overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year." *Id.* at 627. Congress' foci in the two Acts was very different: in IRCA to encourage applications, in Medicare to regulate their flow.

The very dissimilar circumstances of the two lawsuits illustrate this point. Here, the QDEs are seeking to redress the harm caused them in their statutory obligation to provide accurate information to aliens about legalization requirements by the government's misconceived regulations. These organizations cannot themselves file applications for adjustment of status, so their only redress is to bring an action challenging the regulations in district court. Ringer, on the other hand, was seeking an advance guarantee that his later "claim" for reimbursement for an operation would be successful. There is no

parallel. The QDEs are not submitting a request for advance approval of an "application"; they are suing to stop the INS from acting in a way so as to hinder their basic purpose of disseminating accurate information about the legalization program and encouraging all eligible applicants to apply. The majority's asserted analogy to *Ringer* is inapposite. The statutory text in the two cases is different; the statutory schemes are different; the purposes of the two laws in regulating judicial review are altogether different. The majority strives mightily to squeeze its elephant into the proverbial phone booth, but ultimately it fails.

Indeed, a Supreme Court case interpreting the Medicare Act more recently than *Heckler v. Ringer* best points up the majority's strained logic in interpreting 8 U.S.C. § 1255a(f)(1). In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), an organization of family physicians and several individual physicians filed suit in district court challenging a Health and Human Services Department regulation authorizing the payment of Medicare "part B" benefits in different amounts for similar physicians' services. The government argued that the district court lacked jurisdiction, contending that the Medicare Act impliedly forecloses judicial review of any action taken under part B of the Medicare program, because it fails to authorize such review while simultaneously authorizing judicial review of "any determination . . . as to . . . the amount of benefits under part A." 476 U.S. at 673 (quoting 42 U.S.C. § 1395ff(b)(1)(C) (1982 ed., Supp. II)). The government also pointed to a provision in the Act requiring private insurance carriers furnishing part B coverage to afford claimants a "fair hearing" on any claimant's challenge to "the amount of . . . payments" under part B, but making no provision for judicial review of those fair hearings. 42 U.S.C. § 1395u(b)(3)(C).

The Supreme Court rejected the government's arguments, holding that the district court had jurisdiction over the plaintiffs' challenge to the reimbursement regulation. The Court reasoned that the provisions detailing how and in what forum an individual can obtain review of a determination as to the amount of benefits under parts A and B "simply [do] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (emphasis in original).

> [A]n attack on the validity of a regulation is not the kind of administrative action that we described in [*United States v. Erika, Inc.*, 456 U.S. 201 (1982)] as an "amount determination" which decides "the amount of the Medicare payment to be made on a particular claim" and with respect to which the Act impliedly denies judicial review.

476 U.S. at 676. The Court distinguished *Ringer* as a case seeking review of an amount determination, *id.* at 677-78 n.7, and rejected the argument that its ruling would open the floodgates of litigation.

> Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case."

Id. at 680-81 n.11 (emphasis in original) (quoting Note, 97 Harv. L. Rev. 778, 792 (1984)).

Bowen v. Michigan Academy of Family Physicians demolishes the majority's broad reading of the IRCA term "determination respecting an application." 8 U.S.C.

§ 1255a(f)(1). Application of this panel's logic to the *Michigan Academy* case would dictate a result 180 degrees opposed to that reached by the Supreme Court. The majority here argues that a regulation is a "determination respecting an application" because it impacts on the outcome of future determinations on applications. Maj. op., *ante*, at 13. That same logic would have required the Supreme Court to deem the HHS regulation in *Michigan Academy* to be an "amount determination" because it would surely have impact on future amount determinations; the Supreme Court, however, refused to do so.

Michigan Academy also shows the limited applicability of the *Heckler v. Ringer* holding, on which the majority relies. After *Michigan Academy*, the proposition *Ringer* stands for is, at the most, that *individual Medicare claimants* must follow the narrow statutory path of limited administrative and judicial review rather than challenge regulations in federal district court. *Michigan Academy* found that the narrow review provisions simply do not apply to an organization of physicians bringing a facial challenge in district court. A similar logic should prevail in this case: just as the *Michigan Academy* organization was not challenging an "amount determination," the organizations bringing this lawsuit are not seeking review of "a determination respecting an application." Thus, even if the logic of *Ringer* were to dictate that individual aliens could not bring an action in district court directly challenging the INS regulations challenged in the present case—a proposition in itself dubious [9]—*Michigan*

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[9] As discussed above, the *Ringer* preclusion of rule challenges brought by individual Medicare claimants cannot be readily transplanted into IRCA, whose jurisdiction-preclusion provision does not bar all "claims arising under" IRCA but instead bars all suits seeking review of "a determination respecting an application." *See supra* p. 27.

Academy makes clear beyond peradventure that *Ringer's* logic is no bar to a challenge brought by alien-assistance organizations who (like the physicians in *Michigan Academy*) will never have claims capable of being processed through the standard statutory review procedure.

Finally, *Michigan Academy* adopts a pragmatic interpretation of a narrow statutory judicial review scheme by focusing—in a way this panel has failed to—on Congress' purpose for limiting judicial review. The *Michigan Academy* Court recognized a distinction between challenges to agency determinations on individual applications, on the one hand, and challenges to the validity of a regulation establishing the method by which such determinations will be made, on the other. In the present case, just as in *Michigan Academy*, permitting direct judicial review of a regulation "would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." 476 U.S. at 680-81 n.11.[10] The majority's quest for Supreme Court support for its reading of 8 U.S.C. § 1255a(f)(1) is doomed: *Michigan Academy* has knocked its *Ringer* out of the box.

III. Ripeness

Alternatively, the majority rules that the INS policy on § 265 cases was not yet finalized so as to be ripe for review; because it still reflected only the decisions of

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[10] The majority states: "It seems inconceivable that Congress would have wished . . . to closely circumscribe judicial review of legalization decisions that applied whatever regulations the INS issued, and at the same time to allow APA challenges to such regulations in almost any district court of the United States." Maj. op., *ante*, at 15-16. *Michigan Academy*, however, shows that Congress sometimes *does* intend to circumscribe (or foreclose) judicial review of case-by-case application of rules while permitting district court challenges to the rules themselves.

lower level agency officials and had not yet been approved or adopted at the top policymaking level, it was not an "agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(13), not "final" within the meaning of the APA, *id.* § 704, and not "ripe" for purposes of the familiar test enunciated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). I disagree.

My colleagues begin their analysis by pointing out that the INS "acquiesced in the district court's interpretation" of 8 U.S.C. § 1255a(a)(2)(B)—which the majority paraphrases as holding "that 'known to the Government' meant that a nonimmigrant qualified for legalization if he could show that the federal government as a whole had documentation that established his illegal status before 1982." Maj. op., *ante*, at 33-34 (quoting 8 U.S.C. § 1255a(a)(2)(B)). But—they say—after acquiescing in the court's interpretation, the INS never focused on what to do about § 265 cases, in which the government's knowledge of the alien's unlawful status must derive from the *absence* of a required document, rather than the presence of a document, in the alien's files. Evidence that some INS field personnel took the position that § 265 violators were not eligible for legalization even after the INS' acquiescence in the district court's interpretation of 8 U.S.C. § 1255a(a)(2)(B) is not sufficient to show any final agency action on the issue. In their view, only a rule, policy statement, or perhaps official litigation position in a deportation proceeding would make a challenge ripe.

My reading of the record in the trial court convinces me that the INS was implementing an official policy of refusing legalization to § 265 violators even after it had acquiesced in the trial judge's "known to the Government" ruling, and so the § 265 challenge was ripe for review. I find that such a policy was embodied in an

agency regulation, 8 C.F.R. § 245a.1(d).[11] Judge Sporkin's March 30, 1988, decision invalidated that regulation not only because it defined "Government" too narrowly as limited to the INS, but also because it contained an overly restrictive definition of the sort of information the INS must have in its own files to constitute "know[ledge]" under the "known to the Government" provision of IRCA.[12] The logic and language of Judge

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[11] The regulation provided for four circumstances in which an alien's unlawful status would be considered to have been "*known* to the Government." None of the four can possibly be read to include § 265 violators. The four categories are as follows:

> (1) The [INS] received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file . . . . In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or
>
> (2) An affirmative determination was made by the Service prior to January 1, 1982, that the alien was subject to deportation proceedings . . . . ; or
>
> (3) A copy of a response by the Service to any other agency which advised that a particular alien had no legal status in the United States or for whom no record could be found[; or]
>
> (4) The applicant produces documentation from a school approved to enroll foreign students . . . which establishes that the said school forwarded to the Service a report that clearly indicated the applicant had violated his or her nonimmigrant status prior to January 1, 1982.

8 C.F.R. § 245a.1(d).

[12] Wholly apart from its discussion of the INS' interpretation of "Government," Judge Sporkin's March 30 order criticized the regulation's provisions concerning what must be contained in INS files. *See* Ayuda v. Meese, 687 F. Supp. 650,

Sporkin's March 30 and April 6 rulings compelled the INS to drop its regulation-based policy against legalizing § 265 aliens,[13] yet at least some INS officials persisted in interpreting his order otherwise.[14] As a result,

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664-65 (D.D.C. 1988) (opining that those aspects of the regulation "are narrow and operate in practice to prevent some valid claims," and elaborating on how unlikely it would be for an alien to meet the INS' definition of "known").

[13] Judge Sporkin's order stated without qualification: "I declare INS' regulation to be contrary to law," and, again without qualification, it enjoined the INS from "any further application of the regulation." 687 F. Supp. at 666. The order was based not only on the regulation's narrow definition of "Government" but also on its narrow definition of "know[ledge]." *Id.* at 664. Thus, the court invalidated in its entirety the regulation on which the INS's policy concerning § 265 aliens was based.

Judge Sporkin's Supplemental Order of April 6 further clarified that the regulation's invalidity stemmed in part from its narrow definition of "known." *Id.* at 666-67. That order stated that an alien's unlawful status was "known to the Government" if that alien's documentation in one or more government agencies, "taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful." *Id.* at 666.

[14] Affidavits submitted by the plaintiffs reported instances of front-line INS personnel telling § 265 aliens that their applications would be recommended for denial. Moreover, a wire sent by the Associate Commissioner of the INS to all QDEs on April 13, 1988, paraphrased the district court's ruling in such a way as to foreclose legalization of § 265 aliens. After quoting the language of Judge Sporkin's April 6 order, the wire stated: "[T]he violation must be able to be induced from evidence *submitted* to Federal agencies only, and prior to January 1, 1982." Appendix ("App.") at 88 (emphasis added). Thus, while the court's order referred to "documentation taken as a whole," 687 F. Supp. at 666, which would encompass the *absence* of documents *never submitted*, a top official of the INS interpreted the order not to encompass § 265 aliens.

Additionally, counsel for the INS voiced the same interpretation of the March 30 and April 6 orders before the district

the plaintiffs sought and received from Judge Sporkin a subsequent court order (Supplemental Order V) clarifying that § 265 aliens were covered by the logic of his earlier ruling and that the INS must act accordingly.[15]

These circumstances, along with the extreme urgency of the plaintiffs' plight (aliens had literally two days left to file applications at the time of the ruling), severely undercut the majority's ripeness arguments. Their insistence that the cited actions of scattered INS officials discouraging § 265 violators from filing in the weeks following the March 30 ruling did not constitute final agency action is beside the point: it was the original regulation, 8 C.F.R. § 245a.1(d), not the scattershot application of it after March 30. that constituted final agency action. Supplemental Order V, clarifying the application of the earlier order to § 265 violators, simply

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court. Transcript of Status Call, April 28, 1988, at 20 (plaintiffs' arguments concerning § 265 violators do not "comport with the Court's order *that there be documents in the file* in a Government file showing unlawful residence") (emphasis added).

[15] The plaintiffs (who adopted the arguments advanced by several other organizations that tried without success to intervene in the present case) styled their arguments as contending that the March 30 and April 6 orders by their terms and logic already reached the § 265 issue and resolved it in their favor; they therefore sought enforcement and clarification if necessary. Memorandum of Points and Authorities in Support of Intervenors' Motion to Compel Compliance and/or Modify Permanent Injunction, Supplemental Appendix ("Supp. App.") at 12 & n.5 ("Now that the INS policy has been judicially rejected . . . there is no valid remaining reason for the agency's denials."). The putative intervenors and the plaintiffs sought an order compelling the INS to comply with the district court's other rulings, *id.* at 7, 16 n.8, or, in the alternative, an order modifying the earlier rulings to indicate that § 265 aliens were eligible for legalization. *Id.* at 16 n.8. Judge Sporkin's Supplemental Order V essentially did the latter. 687 F. Supp. at 668-69.

reiterated that the entire regulation had been struck down—not merely that aspect of it which defined "Government" solely as the INS, but also the portion defining what kind of information constituted "know[ledge]." When Judge Sporkin became aware that the INS was continuing to follow the policy embodied in a regulation he had already struck down, and that the INS was doing so in reliance on a misconstruction of his prior rulings, he was warranted in issuing a new order clarifying what his other rulings had already stated: that 8 C.F.R. § 245a.1(d) was invalid both in its interpretation of "Government" and in its interpretation of "known."

The majority contends that (even assuming the original 8 C.F.R. § 254a.1(d) did exclude § 265 aliens) the appellees' original complaint in district court contained no "concrete" legal claim against the regulation's interpretation of the statutory term "known." Maj. op., *ante*, at 35 ("Their only specific argument, so far as we can tell, was that 'Government' must mean the entire federal Government and not merely the INS."). This is fallacious. The complaint challenged the INS' definition of "Government" and then went on to allege that "[t]he regulations *further* restrict the statutory provision by specifically enumerating the limited circumstances under which the INS is deemed to *know* of an alien's unlawful status." Complaint, App. 35 (emphasis added). Quite plainly, the complaint asserted that even assuming the INS must know of the alien's unlawful status, the regulation defined "known" in an impermissibly narrow fashion. The complaint's prayer for relief, moreover, requested the establishment of a broad evidentiary standard: an alien would meet the test whenever any federal agency "has or had evidence that, separately or in combination, shows that such alien had violated his or her nonimmigrant status prior to January 1, 1982." Complaint, App. 39. Clearly, the plaintiffs sought the invalidation of 8 C.F.R. § 245a.1(d) as a whole, not just as it defined "Government." For the majority to assert

that "[t]he focus of the proceeding" was on the one issue rather than the other is not only a weak retort to the reality of the record; it is wrong: the complaint advanced a theory that included § 265s, the district court's opinion adopted it; this court cannot post-hoc wish it out of existence.

The majority argues, however, that even if the plaintiffs had initially challenged 8 C.F.R. § 245a.1(d) on the basis of its interpretation of "known," the INS had not yet taken a position on the § 265 issue. Maj. op., *ante*, at 36-41. This is contradicted by the plain terms of 8 C.F.R. § 245a.1(d) itself. *See supra* note 11. The regulation on its face excludes § 265 violators from the legalization program. Given the clarity of the regulation, it cannot be argued that the issue here is not yet fit for judicial decision. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-52 (1967) (preenforcement review available where "[t]he regulations are clear-cut," presenting a "purely legal" issue, and constitute the agency's formal and definitive statement of policy); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 917-18 & n.68 ("the validity of a rule can be ripe for review whether or not it has actually been improperly applied and enforced in a concrete factual setting"). In short, the majority's ripeness arguments ignore the fact that the INS had a formal, final policy on § 265 violators and at least some of its officers continued to pursue that policy after misconstruing the district court's ruling striking down the challenged INS regulation. Only a fundamental misreading of the procedural history of the case can sustain a finding that the § 265 issue was not ripe for judicial review.

IV. The Standing of the Plaintiff Organizations

Although the majority does not base its negative outcome on standing grounds, it does intimate that the plaintiffs' standing in this case is doubtful. Since I find no

statutory bar to jurisdiction, and since the government raised the standing issue, I must discuss it briefly.

A plaintiff challenging agency action in federal court must, in order to meet the Article III test of standing, demonstrate (1) some actual or threatened injury that (2) fairly can be traced to the challenged action and (3) is likely to be redressed by a favorable decision. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988). Additionally, there is the prudential requirement that the asserted injury be "arguably within the zone of interests protected or regulated by the law on which the complaint is founded." *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 936 (D.C. Cir. 1986).

These plaintiff organizations did allege a concrete injury to their organizational activities, caused by the INS' promulgation of 8 C.F.R. § 245a.1(d), and redressable by the court's invalidation of that regulation. Their allegations fall into three broad categories: (1) that their ability to provide accurate information concerning legalization eligibility requirements has been impaired by the legal confusion generated by the INS' alleged misconstruction of IRCA, Complaint, App. 20; (2) that their fundamental organizational purpose of assisting aliens to avail themselves of the benefits of legalization has been directly harmed by the INS' regulations because those regulations have deterred the organizations' clients from filing applications, Complaint, App. 21-23;[16] and (3) that they have had to devote significant

[16] The original complaint stated that one organization's potential clients had been "deterred from filing" because of the INS' interpretation of IRCA. App. 21. The complaint stated that the organization's "extensive counseling campaign to assist Ethiopians and other nationalities to avail themselves of the benefits of legalization under IRCA, which is one of its fundamental organizational purposes, has thus been significantly and directly harmed and frustrated by the INS' invalid regulations." App. 21-22. *See also* App. 23 (another

resources to counteract the effects of the INS' allegedly unlawful interpretation. Complaint, App. 20, 23. These allegations—especially the latter two—are indistinguishable from the allegations held to be sufficient to convey standing on the plaintiff organizations in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). There, it was sufficient that the plaintiff organization, whose purpose was to help minorities buy available housing, was frustrated in that purpose by illegal "racial steering" practices and consequently had to devote significant resources to counteract the effects of those practices. *Id.* at 378-79. This case is, in all material respects, identical to *Havens Realty.*

The interests at stake in this case also satisfy the prudential "zone of interests" requirement. The complaint alleged that 8 C.F.R. § 245a.1(d) made it more difficult for aliens eligible for legalization under IRCA to exercise their statutory right to obtain legalization, and that the organizations' interest in helping the aliens obtain legalization was thereby injured. App. 21-22. Congress clearly had in mind the interests of alien-assistance organizations, like the plaintiffs here, when it designed and adopted IRCA. *See Action Alliance*, 789 F.2d at 939-40 n.11. Congress not only recognized but indeed institutionalized in the Act itself those organizations' ability to render accurate legal advice about legalization requirements. Given Congress' express recognition of the key role played by alien-assistance organizations, the organizations' own interests fall squarely within the zone of interests protected by IRCA. *Action Alliance* held, as a general matter, that such organizational interests as "promotion of the knowledge, enjoyment, and

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organizational plaintiff's "fundamental goals and purposes of assisting Latino youth to obtain the benefits of legalization under IRCA have thus been significantly and directly harmed and frustrated by the INS' misconstruction of the 'known to the Government' requirement").

protection of the rights created by a statute are securely within the 'zone of interests' protected by that statute." *Action Alliance*, 789 F.2d at 939. The interests of the organizational plaintiffs in this case fall precisely into such a category and meet the prudential as well as the Article III requirements for standing.

V. The Merits of the § 265 Question

Finding no bar to the district court's exercise of jurisdiction over this case, I reach—at last—the merits of the dispute. The order challenged in the present appeal held that an alien's unlawful status was "known to the Government" within the meaning of 8 U.S.C. § 1255a (a)(2)(B) if that alien can credibly establish his or her "willful violation of section 265" of the INA, *i.e.*, his or her unexcused failure to file the quarterly reports required by § 265. 687 F. Supp. at 668. The district court held that the absence of a required document in a government file confers "know[ledge]" on the government.

Under § 265 of the INA, prior to January 1, 1982, a nonimmigrant alien was required to file a document stating his current address every three months, so long as he remained in the United States, regardless of whether his address changed. 8 U.S.C. § 1305 (repealed as of Dec. 29, 1981, Pub. L. No. 97-116, § 11, 95 Stat. 1617). Failure to file such quarterly reports while living in the United States rendered a nonimmigrant's status unlawful. Moreover, an alien had to notify the Attorney General within ten days of "each change of address and new address," *id.*, if he departed the United States to live in another country. Thus, the alien's INS file would have to contain either a quarterly report for each three-month period or a change-of-address report indicating that the alien had left the United States and therefore was exempt from the quarterly report requirement. Consequently, as of January 1, 1982, the INS was able to determine from a nonimmigrant's INS file, by the *ab-*

sence of quarterly reports, whether the alien was in violation of § 265.

When Congress used the term "the alien's unlawful status was known to the Government" in 8 U.S.C. § 1255a (a) (2) (B), it obviously contemplated that the INS would be deemed to "know[]" of an alien's unlawful status where an examination of the alien's file would turn up a document that in itself indicates that the alien's status is unlawful.[17] There is no defensible difference between that circumstance and this one: an examination of the alien's INS file would turn up the *absence* of a required document, which absence by itself indicates that the alien's status is unlawful. In both cases the agency has *actual knowledge* from its files of the alien's illegal status. Since perusal of the files produces actual knowledge of illegality, the majority's point about the various possible definitions of the word "known" is irrelevant. Maj. op., *ante*, at 40.[18] Thus, the district court's conclusion that the term "known" unambiguously embraces the circumstance where the absence of a document itself indicates unlawful status seems unimpeachable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (where congressional intent is clear, court and agency "must give effect to the unambiguously expressed intent of Congress").

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[17] Even the INS recognized this in 8 C.F.R. § 245a.1 (d) (4), which considers an alien's unlawful status to be known if a school had sent the INS "a report that clearly indicated the appellant had violated his or her nonimmigrant status" before January 1, 1982.

[18] The majority contends that, while the presence of a document in INS files would convey actual knowledge, the "mere absence of a quarterly report may well not lead to actual knowledge if all files are not monitored closely." Maj. op. at 40. I fail to see how this distinguishes an "absence" case from a "presence" case. If an agency's files are not monitored closley, then agency officials will be equally ignorant of what the files do contain and what they do not contain.

Moreover, contrary to the majority's contention, a § 265 violator's unlawful status could be determined simply by noting the absence of required documents in his file. The majority argues that the INS could not have known, merely by looking at an alien's file, that the alien's failure to file was "willful" and thus rendered the alien's status unlawful. Maj. op., *ante*, at 39. Yet, to begin with, the failure to file a § 265 report was defined in the INA to be a misdemeanor—completely without regard to willfulness. 8 U.S.C. § 1306(b). Moreover, the INA provided that any alien who violated the § 265 filing requirement was to be arrested and deported "unless such alien established to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful." *Id.* § 1306(b). Thus, willfulness was not an element of a § 265 violation; instead, an alien threatened with deportation could invoke nonwillfulness as an affirmative defense that the alien would have the burden of establishing. An INS official looking at an alien's file prior to 1982 would know solely from the absence of one or more required § 265 forms that the alien's status was *prima facie* unlawful. Since that official would have known everything needed to bring a deportation proceeding against the nonfiling alien, the alien's unlawful status was "known to the Government." I agree with the district court that the treatment of § 265 violators in 8 C.F.R. § 245a.1(d) was contrary to law.[19]

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[19] As discussed in the text, however, I do not read § 265 as requiring any showing of willfulness on the part of the government to make out a *prima facie* violation. Hence, the absence of the reports would be sufficient to make a violation "known" to the government. Conversely, the alien wishing to show a past violation would only have to point to the absence of the same reports. The government's earlier failure to prosecute the violation and thereby afford the alien an opportunity to plead a nonwillfulness defense cannot result in a heavier burden on the alien to prove a violation now than the government itself would have had then. This is the one respect in which I would modify Judge Sporkin's order.

VI. Conclusion

In my view, the district court had jurisdiction to rule on the eligibility of § 265 violators for legalization. Neither IRCA's judicial review provisions, nor ripeness or standing doctrine precluded the district court's exercise of federal-question jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 to invalidate INS legalization rules. With one minor exception, I would affirm Supplemental Order V.

Congress meant by the legalization program to extend a generous hand to longtime resident illegal aliens previously consigned to living in the shadows. Under IRCA's amnesty dictates, the aliens had to act quickly to apply for legalization in order to meet prescribed deadlines; the QDEs were established to aid them in their quest for legalization. It flouts the text and purpose of this statutory design to interpret § 1255a(f), as my colleagues do, to prevent any prompt judicial testing of INS rules that wrongfully bar legalization to large categories of those aliens, and to relegate those aliens to individual challenges in the course of deportation proceedings. So interpreted, the legalization program is a cruel joke for a compassionate nation to play on those it purports to welcome and redeem. I cannot believe Congress intended such a result, and so I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

Civ. A. No. 88-0625.

AYUDA, INC., et. al.,

Plaintiffs,

v.

Edwin MEESE, III, Alan Nelson, and INS,

Defendants.

March 30, 1988.

Supplemental Order April 6, 1988.

Supplemental Order II April 7, 1988.

Supplemental Order III April 7, 1988.

Supplemental Order IV May 2, 1988.

Supplemental Order V May 2, 1988.

Supplemental Order VI May 4, 1988.

Supplemental Order VII May 4, 1988.

Supplemental Order VIII June 9, 1988.

Supplemental Order IX June 9, 1988.

Immigration assistance organizations sought preliminary injunction to prevent Immigration and Naturalization Service from enforcing its rule which limited the number of aliens, otherwise eligible, who could seek legalized residence status. The District Court, Sporkin, J., held that: (1) organizations had standing; (2) organizations had no administrative remedies to exhaust; and (3) organizations were entitled to preliminary relief.

So ordered.

Wayne Matelski, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., for plaintiffs; Eva M. Plaza, Eleanor Pelta, Carl Valenstein, David Aronofsky, Lynda S. Zengerle, Arent, Fox, Kintner, Plotkin & Kahn, Deborah Sanders, Washington Lawyers' Committee Under Civil Rights Under Law, Washington, D.C., Lucas Guttentag, American Civil Liberties Union, Immigration Task Force, New York City, Ira J. Kurzban, Kurzban, Kurzban, Weinger & Holtsberg, Miami, Fla., Michael Rubin, Altshuler & Berzon, San Francisco, Cal., Carolyn Waller, Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C., Gilbert P. Carrasco, Hispanic Nat. Bar Ass'n, New York City, of counsel.

MEMORANDUM OPINION AND ORDER

SPORKIN, District Judge.

This class action lawsuit is now before this court on plaintiffs' complaint seeking declaratory and injunctive relief. Plaintiffs, who are nonimmigrant aliens and organizations whose prime function is to perform immigration counseling, brought this lawsuit to challenge regulations promulgated by the Immigration and Naturalization Service ("INS") implementing the legalization or "amnesty" provisions of the Immigration Reform and Control Act of 1986 ("IRCA"). Plaintiffs contend that the regulations implementing the statutory requirements for nonimmigrants to establish their eligibility for legalization (or amnesty) "violate the plain meaning of the statute, are unreasonable and unlawfully exclude individual plaintiffs and the class they represent from obtaining legal immigration status." Complaint at ¶ 1. Plaintiffs specifically take issue with defendants' interpretation of the statutory phrase "unlawful status was known to the Government" prior to January 1, 1982. *See* 8 U.S.C. § 1255a(a)(2)(B). According to

plaintiffs, defendants' regulations unlawfully preclude INS from relying on any other evidence, including Internal Revenue Service records, Social Security Administration records or any other similar federal government records to satisfy the "unlawful status was known to the Government" requirement—even if those records can irrefutably establish that an alien violated his or her nonimmigrant status prior to January 1, 1982.

It is defendants' position that IRCA requires nonimmigrant aliens who claim eligibility for legalization under the "known to the Government" standard to prove affirmatively that the INS itself knew of his or her unlawful status prior to January 1, 1982. In implementing the statute, the defendants have by regulation interpreted the "known to the Government" standard as meaning "known to the INS." Plaintiffs contend that defendants' interpretative regulation is contrary to the plain meaning of the statute and seek declaratory relief as well as an injunction prohibiting that narrow construction of the statutory language.

I held a hearing on March 25, 1988 on plaintiffs' motion for a preliminary injunction at which I heard testimony from three witnesses. The plaintiffs presented testimony from Father Kevin Farrell, a representative of the Associated Catholic Charities and the Spanish Catholic Center of the Archdiocese of Washington, D.C. and Ms. Konjit Getachew, an immigration case worker for the Ethiopian Community Center. These organizations are "qualified designated entities," which is a special status accorded to certain immigration counseling organizations under IRCA. Both Father Farrell and Ms. Getachew are experienced in immigration counseling and are deeply involved in the legalization program. The Government presented testimony from Terrance O'Reilly, the Deputy Commissioner for Legalization of the Immigration and Naturalization Service. Their testimony was credible and I have credited it. I have also heard oral argument.

In light of the obvious need to make an expeditious decision in this matter, and based on the testimony, the oral argument and the written briefs and exhibits, I make the following findings of fact and conclusions of law:

THE FACTS

On November 6, 1986, the President signed into law the Immigration Reform and Control Act of 1986, Pub.L. 99-603. This legislation is the most comprehensive reform of our immigration laws since the enactment in 1952 of the Immigration and Nationality Act ("INA"). The product of intensive Congressional debate, IRCA was crafted carefully to obtain consensus among competing interests and viewpoints. The act reflects both a national resolve to control illegal immigration and our Nation's concern and compassion for certain aliens who have been residing illegally in the United States. *See generally* H.R.Rep. No. 682, 99th Cong., 2d Sess., at 46, 49 (1986), U.S.Code Cong. & Admin.News 1986, p. 5649; 52 Fed.Reg. 16205 (May 1, 1987). IRCA contains provisions that address both of these concerns, including employer sanctions for hiring illegal aliens, prohibitions against certain types of employment discrimination, provisions that strengthen the enforcement capabilities of the Attorney General and INS, and several programs for granting legal status to aliens residing illegally in the United States. This lawsuit concerns one aspect of the legalization program.

The central legalization program in the Act provides for the legalization of aliens who entered the United States prior to January 1, 1982, and who have resided continuously in the United States in an unlawful status since that date. Section 201 of IRCA, codified as INA § 245A, 8 U.S.C. § 1255a. Section 201 of the Act provides that in order to be eligible for legalization, an alien must satisfy four requirements: (1) An alien must make timely application. For the vast majority of plaintiffs, that requirement can only be met by filing an application prior to May 4,

1988; (2) An alien must have been in continuous unlawful residence in the United States since 1982; (3) An alien must have been continuously present in the United States since the enactment of the statute on November 6, 1986; and (4) An alien, with certain exceptions, must be admissible as an immigrant. Section 201 of IRCA, 8 U.S.C. § 1255a(a)(1)-(4). Aliens who meet these four requirements shall be granted the status of an "alien unlawfully admitted for temporary residence." 8 U.S.C. § 1255a(a).

Regarding the second requirement, "continuous unlawful residence since 1982," the meaning of which is at the heart of this case, IRCA provides, in its entirety, as follows:

> (2) Continuous unlawful residence since 1982
>
> **(A) In general**
>
> The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.
>
> **(B) Nonimmigrants**
>
> In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's *unlawful status was known to the Government* as of such date.
>
> **(C) Exchange visitors**
>
> If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

8 U.S.C. § 1255a(a)(2) (emphasis added). Aliens who entered the country unlawfully—that is without permission and without inspection at a border—are eligible for legalization if they show continuous residence in the United States since 1982. Such residence, because of the manner they entered the country, is by definition unlawful.

Similarly, aliens who entered the country lawfully as nonimmigrants—that is, entered with the permission of the United States and submitted to inspection at the border—are eligible for legalization if their status became unlawful prior to January 1, 1982. The Act provides that a nonimmigrant can establish the requisite unlawful status by one of two alternative methods. The alien either must establish that the alien's period of authorized stay—that is, his or her visa—expired before 1982 or the alien must establish that the alien violated the terms of his or her visa prior to 1982 and that his or her "unlawful status was known to the Government." The focus of this case is the meaning of that final term—"unlawful status was known to the Government" prior to January 1, 1982.

On March 19, 1987, INS published a notice of proposed rulemaking on the implementation of the legalization provisions of IRCA in the Federal Register. 52 Fed. Reg. 8752. The proposed rulemaking limited the term "known to the Government" to mean "known to the INS." *See* 52 Fed. Reg. at 16202 (May 1, 1987) (discussing reaction to proposed eligibility requirements for legalization). In response to the proposed rule, INS received 91 comments which addressed the "known to the government" issue. *Id.* According to INS, "[a]ll of the comments clearly stated that the definition was far too restrictive and should be modified to include all Federal agencies." *Id.* Many of the responses also suggested that state and local agencies should be included. *Id.*

On May 1, 1987, INS promulgated final rules implementing the legalization provisions of IRCA. 52 Fed.Reg.

16205 (May 1, 1987) codified at 8 C.F.R. 245a1(d). Despite the public's adverse comments, these regulations provide that in the term "unlawful status was known to the Government," the term "Government" means the Immigration and Naturalization Service. 52 Fed. Reg. at 16206. The regulations provide, in relevant part:

> In the term "alien's unlawful status was known to the Government," the term "government" means the Immigration and Naturalization Service. An alien's unlawful status was "known to the Government" only if:
>
> (1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, *and* such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or
>
> (2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was subject to deportation proceedings. . . . ; or
>
> (3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

8 C.F.R. § 245a.1(d) (May 1, 1987).[1]

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[1] While not precisely before me at this time, I would note that the regulations seem to be poorly drawn in respects other than the one

On September 22, 1987, the district court for the Northern District of Texas, on a motion for a writ of habeas corpus, held that INS' regulations regarding the "known to the Government" requirement are "inconsistent with the Reform Act and are Outside the scope of INS' authority." *See generally Farzad v. Chandler,* 670 F.Supp. 690 (N.D.Tex.1987), *motion to alter or amend judgment denied,* Jan. 11, 1988, *motion to dismiss or vacate order denied,* Jan. 12, 1988. Defendants have appealed that ruling to the United States Court of Appeals for the Fifth Circuit. In the meantime, the INS has continued to use these regulations, without any modification to accord with the *Farzad* decision, to process legalization applications pending the resolution of that appeal.[2] Thus despite the ruling in *Farzad v. Chandler,* it is clear that an individual, although he was in the United States illegally prior to January 1, 1982, does not qualify for legalization without meeting the very limited INS regulations. Individuals who fall into this category are also aware that in order to become legalized in accordance with INS procedures, they will first have to exhaust their administrative remedies

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challenged herein. For example, the regulations would seem to preclude information contained in the INS' own files that came from sources other than another federal government agency—such as, for example, information from a State or foreign government—from being used to meet the "known to the Government" requirement.

[2] *See generally* Defendant's Exhibit 1, Dec. 30, 1987 letter from William S. Slattery, Assistant Commissioner of Legalization to Mr. Michael Maggio, Chair AILA-CO Liaison Committee (applications "from applicants who do not meet the standard for 'known to the Government' under 8 C.F.R. 245a.1(d), but who do claim that they are eligible because a government agency, other than INS, had information establishing their unlawful status . . . are to be recommended for denial . . . "); *see also* Plaintiff's Exhibit 1, Opinion by the Director of the Legalization Appeals Unit, March 18, 1988 (finding applicant ineligible for temporary resident status due to failure to satisfy INS' interpretation of "known to the Government" requirement).

and they will then have to defeat the INS in federal court.[3] *Id.* In other words, nonimmigrant aliens realize that obtaining legal status is almost certain to be an expensive, protracted process. Plaintiffs' witnesses have made it clear that INS' stance has deterred many nonimmigrant aliens who would otherwise qualify for legalization from submitting an application.

On November 17, 1987, the INS published an interim final rule that added one additional basis on which an alien's unlawful status could be known to the Government. 52 Fed.Reg. 43843 (November 17, 1987) codified at 8 C.F.R. § 245a.1(d)(4). Pursuant to that amendment, an alien can meet the statutory requirement provided the alien can provide INS with documentation from an approved school wherein the school informed the INS that an alien had violated his nonimmigrant status prior to January 1, 1982. That amendment has been interpreted by INS to mean "that the applicant for legalization can show his or her unlawful status was known to the Government if he or she submits documentation from an appropriate school showing that (1) the school previously reported that the student was in unlawful status, and (2) the previous report was made to the Service prior to January 1, 1982, or, the appropriate school made an 'immediate report' about unlawful status existing prior to January 1, 1982 . . . *although the report was received by the Service after January 1, 1982.*" Defendants' Exhibit 4, Declaration of Terrance M. O'Reilly at 2 (emphasis added).

On March 8, 1988 the five named individual plaintiffs and the four organizational plaintiffs brought this lawsuit. The individual plaintiffs are members of a nationwide class consisting of aliens who would otherwise be eligible for legalization but for the INS' interpretation of the "known to the Government" requirement in IRCA. The organi-

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[3] And, of course, they will have to prevail on appeal if they win at the district court level.

zational plaintiffs devote the majority of their efforts to assisting immigrants and have been actively and extensively engaged in the legalization program created by IRCA. The one year amnesty period during which aliens may apply for legalization expires on May 4, 1988.

JURISDICTION

Before reaching the merits, I must address defendants' contention that this controversy is not yet justiciable. Defendants raise challenges to the standing of both the individual plaintiffs and the organizational plaintiffs. In addition, defendants assert that the doctrine of exhaustion of remedies precludes judicial review at this time. I have reviewed defendants' arguments and have determined that they are without merit.

A. *Standing*

In assessing the standing issue, I must assume the truth of plaintiffs' uncontested allegations and construe the complaint in plaintiffs' favor. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 109, 99 S.Ct. 1601, 1613, 60 L.Ed.2d 66 (1979); *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In any case, defendants have presented no countervailing factual evidence against plaintiffs' standing allegations.

Article III of the Constitution limits this court's jurisdiction to "cases" and "controversies." *Diamond v. Charles,* 476 U.S. 54, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986). In order to satisfy Article III's "case" or "controversy" requirement, a litigant must " 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)

(footnote and citations omitted). *See also Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

The four organizational plaintiffs in this lawsuit—especially the two which are Qualified Designated Entities ("QDEs") pursuant to IRCA, undoubtedly have standing to bring this lawsuit. These organizational plaintiffs—which include Ayuda, a non-profit legal services agency that provides immigration counseling for low- income Hispanics in the D.C. area, the Ethiopian Community Center, a non-profit entity organized to provide immigration counseling, the Latin American Youth Center ("LAYC"), a not-for-profit corporation organized for the purpose of assisting Latino youth adjust to the norms and institutions of American life, which has been actively involved in counseling applicants for legalization and disseminating information concerning the eligibility requirements of IRCA, and the Mexican American Legal Defense Fund ("MALDEF"), a non-profit legal advocacy organization which has expended considerable resources in counseling applicants about IRCA's eligibility requirements—have standing in their own right.

Each of these organizations has placed a high priority on immigration counseling. Two of these organizations, Ayuda and the Ethiopian Community Center, are Qualified Designated Entities pursuant to IRCA. *See generally* Section 245A(c)(1)-(4) of IRCA; 8 U.S.C. § 1255a(c)(1)-(4). Congress has conferred special status on those organizations which:

> . . . the Attorney General determines are qualified and have substantial experience, demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 209 or 245, Public Law 89-732 [8 U.S.C. § 1255 note], or Public Law 95-145.

8 U.S.C. § 1255a(c)(2)(A) and (B).[4] Those organizations selected by the Attorney General to be QDEs add valuable assistance to the legalization process through counseling applicants, disseminating information about the program and by screening and processing applications. *See generally* 8 U.S.C. § 1255a(c)(1)-(4). In short, the QDEs act as intermediaries between the alien and the INS. *See,* Exhibit B of Plaintiffs' Reply Brief, Articles I and IV of the QDE Standard Form Cooperative Agreement. In order to perform their statutory mission—and to function effectively as qualified designated entities—these organizations and others similarly situated must, at the very least, have a clear and correct interpretation of the legalization program's eligibility requirements—including the requirement that a nonimmigrant's "unlawful status was known to the Government" as of January 1, 1982.

At the present time, however, the ability of each of these four organizations to provide accurate information concerning the eligibility requirements for legalization under IRCA, which is both a function the statute assigns to QDEs and one of the organizations' primary goals, has been impaired by the legal confusion created by INS' narrow construction of the statute. That confusion arose from INS' replacement of the word "INS" for the word "Government" in the statutory term "unlawful status was known to the Government." The uncertainty was exacerbated by the *Farzad v. Chandler* court's subsequent invalidation of INS' interpretation and INS' intransigent reaction to that outcome. The testimony of both Father Farrell and Ms. Getachew made it obvious that at the present time, the QDEs and other organizations trying to

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[4] *See also* 52 Fed.Reg. 16208, 16209 (May 1, 1987), 8 C.F.R. § 245a.1(l) (" 'designate entity' means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined by the Service to be qualified to assist aliens in the preparation of applications for Legalization status).

provide immigration counseling are whipsawed between the federal court's invalidation of INS' construction of the statute and the agency's steadfast refusal to acquiesce in that ruling.

Because of the confusion about the "known to the Government" standard, plaintiff-organizations are handicapped in their ability to perform their core function—immigration counseling. That inability arises both from the fact that the message they seek to disseminate to nonimmigrant aliens is hopelessly confused and contradictory, and because the "word on the street" deters many potential nonimmigrant applicants from even seeking their advice. The organizational plaintiffs' predicament is summed up well by Ayuda's Executive Director, who states:

> Our ability to provide accurate information on eligibility requirements is impaired by the INS regulation, 8 C.F.R. § 245a.1(d) (1987), on the proper interpretation of the phrase "known to the Government" as contained in the statute, 8 U.S.C. § 1255a[a](2)(B). Although we believe that the regulation clearly goes beyond the meaning and authority of the statute, we cannot tell prospective applicants who seek legal guidance from us that they are eligible for legalization because of the continuing existence of the regulation. On the other hand, we are reluctant to inform such prospective applicants that they are ineligible on the basis of a regulation that we consider facially invalid. Moreover, if such advice were given and such persons did not apply as a result, an effort to establish Ayuda's liability for causing the loss of this valuable legal entitlement might be made by those who would have otherwise applied when the regulation is invalidated.

Affidavit of Yvonne M. Vega at ¶ 4. Hence, the organizational plaintiff's substantive goals have been frustrated—because of the INS' regulations they have been largely

unsuccessful in helping otherwise eligible nonimmigrants obtain legal status under IRCA's legalization program.

Furthermore, as the plaintiff's affidavits demonstrate, the contradictory signals sent out by INS, the *Farzad* court and the plain language of the statute has made these organizations' immigration counseling tasks much more complex, burdensome and time consuming than they should be. The organizations' limited resources are being needlessly squandered because of the INS' regulations. That is so for two principal reasons.

First of all, because of the "word on the street" that non-immigrant aliens with "known to the Government" problems will be denied legalization by INS, many of these individuals have decided for themselves that they are not eligible for legalization under defendants' current regulations. These individuals "self-disqualify" and never contact an attorney or counselor. Testimony of Father Farrell and Ms. Getachew; *see also* Affidavit of Charles Gordon at ¶ 5; Affidavit of Nicole Kim at ¶9 (" . . . many aliens who qualify for legalization under the known to the Government standard are unaware of their eligibility . . . "); Affidavit of Darlene Kalke at ¶ 10. The plaintiff-organizations have been forced to expend extensive additional resources on outreach and publicity in their effort to overcome the deterrent effect of INS' regulations and to encourage these nonimmigrant aliens to seek immigration counseling and to apply for legalization prior to the May 4, 1988 deadline. Despite these efforts, significant numbers of otherwise eligible potential applicants for legalization have been deterred from filing by INS' policy.

The second drain on the resources of organizational plaintiffs is that they spend a substantial amount of time and resources handling the complexities of "known to the Government" cases. Organizational plaintiffs have been forced to undertake the daunting task of explaining to nonimmigrant aliens the meaning of INS' regulations—and

how those regulations jibe with the statutory language in IRCA. They have to provide individuals with "known to the Government" problems advice about how to proceed—namely whether or not to invest the substantial time and money necessary to file an application (and protect their statutory right to legalization) despite the strong likelihood that INS will deny them legalization. Furthermore, the organizational plaintiffs are strapped with the burden of shepherding those nonimmigrant aliens with "known to the Government" problems who do, in fact, apply for legalization through the administrative maze simply to get into federal court to challenge INS' interpretation.

These costs are considerable, and divert scarce organizational resources from other aliens who need assistance. Because of this drain on their resources, the organizational plaintiffs' ability to achieve their goals has been severely hampered. Moreover, Ayuda's and the Ethiopian Community Center's ability to carry out their functions as QDEs—particularly their obligations pursuant to the Cooperative agreements they entered into with the INS to provide legalization services and public information, (*see infra*), is being substantially impaired by the INS interpretation of "known to the Government." *See* Affidavit of Yvonne M. Vega at ¶ 7.

Another product of the confused state of the "known to the Government" standard is that the QDEs have been placed in an intolerable and conflicting position. They are permitted under IRCA to obtain funds for processing applications. These fees are not inconsiderable, amounting in some cases to almost $200. As counselors and advisors, their motives could be questioned if they counseled individuals falling in this nonimmigrant alien class to file their application for legalization contrary to the position taken by the INS in the hope of obtaining a reversal of that position through the administrative process. If the INS' position is sustained, the applicants will have not only lost their right to remain in the United States, but also would

have suffered considerable damages because of the funds they would have expended in the application process. These monies are nonrefundable. It could be expected or anticipated that many of those unsuccessful applicants could be expected to seek recourse against the QDEs for their erroneous counseling. In those instances where the QDEs have advised against going forward, they of course leave themselves vulnerable to complaints by individuals who have failed to make a timely filing—if in fact the INS' position is eventually reversed. The QDEs have a powerful interest in resolving this conflict. They need certainty in this field, and they need it now.[5]

This conflict is exacerbated by Article IV, ¶ 3.2 of the Cooperative Agreement between the QDEs and INS. That paragraph requires the staff of QDEs to comply with all INS regulations relating to the legalization program. The defendants take the position that this provision means that a QDE staffer must enforce even a regulation that is facially contrary to law—as is the regulation challenged in this lawsuit. I believe that such a position compounds the QDEs' problem and provides an even more compelling reason to give the organizations the right to have the issue resolved. Otherwise, they will be required to carry out a regulation that is contrary to law. I am deeply troubled by the INS' position that they have the contractual right to compel an organization to carry out a regulation that on its face violates the law—and that nevertheless, the organizations lack standing to challenge that interpretative regulation.[6]

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[5] The QDEs' right to a prompt resolution of their conflict is particularly powerful because these organizations are acting as Good Samaritans and are responding to both the pleas of their government and their community.

[6] I note also that the INS' conception of its relationship with the QDEs is directly contrary to the arms-length, independent relationship Congress intended so as to preserve the immigration community's trust

These facts portray a classic case for organizational standing. Nevertheless, the defendants contend that "[t]he organizational plaintiffs are not within the scope of the statute and have not suffered injury for standing purposes." Defendants' Brief at 22.

In order to establish standing to sue, an organization must satisfy both constitutional and prudential requirements. The D.C. Circuit has summarized the standard as follows:

> To establish standing to challenge an agency's handling of its affairs a plaintiff must plausibly (1) allege injury in fact derived from the agency's action or inaction and remediable by the court's order, and (2) assert that the injury is arguably within the zone of interests protected or regulated by the law on which the the complaint is founded.

Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 936 (D.C.Cir.1986). *See also Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758-59, 70 L.Ed.2d 700 (1982); *Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253, 259 (D.C.Cir. 1983).

Numerous courts have held that allegations strikingly similar to those made by the four organizational plaintiffs in this case were sufficient to establish injury in fact. In the leading Supreme Court case about organizational standing, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), the Court held that the plaintiff organization—a housing counseling organization that promoted integrated housing called Housing Opportunities Made Equal ("HOME")—had standing to challenge the racially discriminatory steering practices of

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in the QDEs—and hence their ability to perform outreach and immigration counseling.

the defendant real estate agency. In reaching that conclusion, the Court stated:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more that simply a setback to the organization's abstract social interests.

Id. 455 U.S. at 379, 102 S.Ct. at 1124. Similarly, in *Action Alliance of Senior Citizens v. Heckler,* 789 F.2d 931 (D.C.Cir. 1986) the D.C. Circuit held that an organization which relied on the government's dissemination of certain information to accomplish its own counseling, referral services and information dissemination had standing to challenge government regulations which reduced the amount of information disseminated by the government. In finding that the plaintiff satisfied the injury in fact requirement, the Court emphasized that:

> Unlike the 'mere interest in a problem' or ideological injury in *Sierra Club* [*v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636], the AASC organizations have alleged inhibition of their daily operation, an injury both concrete and specific to the work in which they are engaged.

Id. 789 F.2d at 938. In both *Havens Realty* and *Action Alliance,* the plaintiff alleged both a drain on its organizational resources and that it was hindered by the challenged activity in meeting its organizational goals.[7]

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[7] Several courts that have applied the *Havens Realty/Action Alliance* standard have stressed the "two-fold" nature of the inquiry into organizational injury in fact. *See e.g. Bittner v. Secretary of Defense,* 625

As was the case in both *Havens Realty* and *Action Alliance*, the INS' narrow construction of the statute has markedly impaired the plaintiff-organizations' ability to perform its core functions and to achieve its organizational goals.[8] This case is on all four with the facts in *Action Alliance*. Like the plaintiff organizations in *Action Alliance*, the government action which these plaintiff organizations challenge has undercut their ability to disseminate accurate information to the individuals they seek to serve—a core organizational function.

Finally, I note that as the Supreme Court made clear in *Havens*, it is irrelevant that the organizational interests injured by INS' actions are in substantial part non-economic in nature:

> That the alleged injury results from the organization's non-economic interests in encouraging open housing does not effect the nature of the injury suffered, *Arlington Heights v. Metropolitan Housing Corp.*, 429

F.Supp 1022, 1025 (D.D.C.1985) ("when an organization alleges that it has been *hindered* by a defendant in its efforts to assist others to obtain constitutional or statutory rights *and* that it has had to *devote significant resources* to counteract a defendant's action, it has alleged a sufficient injury to itself to establish standing") (emphasis added); *see also Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 203 (5th Cir.1984) *aff'd* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Davis v. Mansards*, 597 F.Supp. 334, 343 (N.D. Ind.1984); *Minority Employees v. Tennessee*, 573 F.Supp. 1346 M.D.Tenn.1983).

The accepted view in this circuit, however, is that an organization need not prove a drain on its resources in order to "come within the *Havens* formula." *See Action Alliance, supra*, 789 F.2d at 937-38; *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 799, n. 2 (D.C.Cir.1987) (Bork, J.). In any case, all four of the organizational plaintiffs meet the more stringent test for organizational injury in fact.

[8] The organizational plaintiffs' core functions are spelled out in detail at ¶¶ 7-10 of the Complaint for Ayuda, Inc.; ¶¶ 11-13 of the Complaint for The Ethiopian Community Center, Inc.; ¶¶ 14-17 of the Complaint for the Latin American Youth Center and ¶¶ 18-21 of the Complaint for the Mexican American Legal Defense and Educational Fund.

> U.S. 252, 263 [97 S.Ct. 555, 562, 50 L.Ed.2d 450] (1977), and accordingly does not deprive the organization of standing.

Havens Realty, supra, 455 U.S. at 379, n. 20, 102 S.Ct. at 1124, n. 20. Both the economic and the non-economic harms these organizations have absorbed because of INS' policy count toward satisfying the injury in fact requirement. There can be no question that these organizational plaintiffs have shown sufficient injury for Article III standing. *See generally United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"),* 412 U.S. 669, 689, 93 S.Ct. 2405, 2416-17, 37 L.Ed.2d 254 (1973).

There also can be no question that the organizational plaintiffs' interests are arguably within the zone of interests protected or regulated by the statutory provision in question. The D.C. Circuit has emphasized that "[t]he zone of interests adequate to sustain judicial review is particularly broad in suits to compel federal agency compliance with law, since Congress itself pared back traditional prudential limitations by the Administrative Procedure Act . . . " *FAIC Securities v. United States,* 768 F.2d 352, 357 (D.C.Cir.1985) (citations omitted). *See also Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Similarly, the Supreme Court recently held that the zone of interests test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would be plaintiff." *Clarke v. Securities Industry Association,* 479 U.S. 388, 107 S.Ct. 750, 757, 93L.Ed.2d 757 (1987). According to the Court, "the test denies a right of review if the plaintiff's interest are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

In this case, Congress clearly placed these organizational plaintiffs squarely within the zone of interests created by

IRCA. Through IRCA, Congress has provided a special status for community organizations such as plaintiff organizations and has accorded many of them—including plaintiffs Ayuda and the Ethiopian Community Center—the special status of Qualified Designated Entities. *See* 8 U.S.C. § 1255a(c)(2). In doing so, Congress recognized the special relationship between these community organizations and the individual nonimmigrant aliens:

> The bill provides that applications for legalization may be filed with the Attorney General or voluntary State, local, and community organizations and individuals designated by the Attorney General as qualified . . .
>
> The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is the distrust of authority and lack of understanding among the undocumented population. The Committee hopes that by working through the voluntary agencies, the Attorney General might be able to encourage participation among undocumented aliens who fear coming forward. To assist in this endeavour, the bill authorizes the Attorney General to fund outreach service . . .

H.R.Rep. 99-682, Part I, at 72-73, 99th Cong., 2d Sess., U.S.Code Cong. & Admin. News 1986, pp. 5676, 5677. As discussed above, the QDEs are required by the terms of their cooperative agreements with INS to perform the function of intermediaries between INS and the Act's beneficiaries. They are charged by IRCA with responsibility for outreach to the alien community, counseling of aliens and processing their applications for legalization. In short, IRCA formally recognizes the QDEs as both the alien's representative and his or her "best friend." The beneficiary's interests are their interests. They are truly "two sides of the same coin." *FAIC Securities, Inc. v. United*

States, 768 F.2d 352, 359 (D.C.Cir.1985) (Scalia,J.). The special institutional role provided QDEs by the Act not only carries certain responsibilities, but also enables the QDEs to more effectively aid those aliens eligible to apply for legalization. In so doing, it permits them to better achieve their organizational goals. It is INS' impairment of their ability to perform adequately this special role which has led these QDEs to bring this lawsuit. Because "the challenging party need only show that it is an intended beneficiary of the statute, not necessarily the primary one," *Constructores Civiles de Centroamerica S.A. v. Hannah,* 459 F.2d 1183, 1189 (D.C.Cir.1972), these organizational plaintiffs meet the zone of interests test.[9]

B. *Exhaustion of Administrative Remedies*

Defendants argue that plaintiffs may not bring this case until after they exhaust their administrative remedies. That argument is without merit. Defendants' exhaustion argument is simply inapposite when applied to the organizational plaintiffs. No administrative remedy exists for organizational plaintiffs to resolve the conflict between the *Farzad v. Chandler* ruling and the plain meaning of the statute on the one hand and the INS' narrow interpretation of the "known to the Government" requirement on the other. There is simply no administrative process to which to appeal. For the harm suffered by organizational plaintiffs, therefore, no exhaustion is necessary. Their remedy can only be found in federal court.

PLAINTIFFS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF

In the District of Columbia Circuit, the appropriate four-step test for the issuance of a preliminary injunction is

[9] Because I have determined that the organizational plaintiffs have standing to bring this lawsuit, and because of the need for a prompt resolution of this matter, I do not reach either the issue of individual plaintiffs' standing or the question of whether the plaintiff organizations have third-party standing to assert the interests of the individual non-immigrant alien plaintiffs.

that the movant show that: 1) the party seeking relief is likely to prevail on the merits; 2) that it will suffer irreparable injury if the preliminary relief is not granted; 3) that harm to others will not result if the relief is granted; and 4) that granting the injunction is in the public interest. *Washington Metropolitan Transit Commission v. Holiday Tours,* 559 F.2d 841 (D.C.Cir.1977); *Virginia Petroleum Jobbers, Association v. FPC,* 259 F.2d 921 (D.C.Cir.1958).

A. *Plaintiffs Will Prevail on the Merits*

This case poses a circumscribed legal question. The sole legal issue before me is the legality of INS' interpretation of the term: "unlawful status was known to the government as of [January 1, 1982]." The Supreme Court has set forth the appropriate standard and methodology for deciding whether the INS' interpretation of the contested phrase conflicts with IRCA in clear and certain terms:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (footnotes omitted).

1. Congress' Intent is Made Clear by the Plain Meaning of the Statutory Language

The first step in the analysis mandated by *Chevron* is to determine whether the "the statute unambiguously expresses Congressional intent on the precise question at issue." *Coalition to Preserve the Integrity of American Trademarks v. United States,* 790 F.2d 903 (D.C.Cir.) *cert. granted sub nom. K Mart Corporation v. Cartier,* 479 U.S. 1005, 107 S.Ct. 642, 93 L.Ed.2d 699 (1986). Obviously the first place to look for legislative intent is in the words of the statute. There is a powerful presumption that Congress means what it says—and that Congressional intent is expressed by the plain meaning of the language used. *INS v. Hector,* 479 U.S. 85, 107 S.Ct. 379, 381, 93 L.Ed.2d 326 (1986), *on remand Hector v. INS,* 810 F.2d 65 (3rd Cir.1987).

I believe that INA Section 245(a)(2)(B) is crystal clear: A nonimmigrant alien applicant may qualify for legalization if he or she can prove that his or her "unlawful status was known to the *Government*" as of January 1, 1982. Both the ordinary meaning of the word "Government"—which obviously is not usually taken to mean "INS"—and Congress' use of the term elsewhere in IRCA undercuts defendants' limited construction of "Government" to mean "INS."[10]

Throughout the text of IRCA, Congress exhibits its ability to differentiate between the "INS" and the "Government." As the *Farzad v. Chandler* court points out, "Except in [Section 245A(a)(2)(B)], Congress refers specifically to the Attorney General and INS throughout the Reform Act; here, by contrast, it consciously chose to use the term "the Government." 690 F.Supp. at 693. When

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[10] *See Farzad v. Chandler,* 670 F.Supp. 690, 693 (N.D.Tex.1987).

Congress intended to specify a particular agency of the federal government, it used the name of that agency. For instance, according to plaintiffs, Congress referred to the "Attorney General" at least 35 times in IRCA when it sought to single him out.[11] Similarly, when Congress sought to refer to the entire federal government in IRCA it used the term "Government."[12] Moreover, when Congress sought to refer to more than one agency but less than the entire "Government," it modified the term "Government."[13]

Hence, when crafting IRCA, Congress chose its words with care. Contrary to defendants' suggestion that "the wording of the ['known to the Government'] provision suggests that it was not well-crafted," a close examination of IRCA reveals careful attention to the difference between the "Government" and the "INS." IRCA is plainly not a statute where Congress used the term "Government" to refer to the agency charged with administering the Act.[14] *See Farzad v. Chandler*, 690 F.Supp. at 693. The language used in the Act provides no basis for the defendants' implicit claim that Congress used the terms INS and "Gov-

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[11] *See, e.g.* INA §§ 274A(b)(1)(A), 8 U.S.C.§ 1324a(b)(1)(A); 274A(b)(1)(D)(i), (ii), 8 U.S.C. § 1324a(b)(1)(D)(i), (ii); 274A(e), 8 U.S.C. § 1324a(e); 245A(a), 8 U.S.C. § 1255a(a).

[12] *See e.g.* INA § 274A(d)(2)(C), 8 U.S.C. § 1324a(d)(2)(C) (amending INA to limit access by "Government" agencies to information utilized by employers to verify work authorization); INA § 245A(h)(1)(A)(i), 8 U.S.C. § 1255a(h)(1)(A)(i) (Attorney General must consult with "appropriate heads of the *various departments and agencies of Government*").

[13] *See e.g.* INA Section 290(a), 8 U.S.C. § 1360(a) ("security and enforcement agencies of the Government"); INA § 214(c), 8 U.S.C. § 1184(c) ("appropriate agencies of Government" are the Departments of Labor and Agriculture).

[14] Defendants' argument also falls short of explaining the rationale for shaping the regulations to preclude an applicant from using knowledge possessed by the Attorney General as a means to satisfy the statutory requirement.

ernment" interchangeably. Rather, Congress consistently distinguished between the two throughout IRCA. There is no basis to believe that Congress departed from that uniform practice when it used the term "known to the Government" in § 245A(a)(2)(B). *See e.g. Atlantic Cleaners and Dryers, Inc. v. United States* 286 U.S. 427, 433, 52 S.Ct. 607, 608-09, 76 L.Ed. 1204 (1932) (absent evidence to the contrary, it must be presumed that Congress intends a word or term to have the same meaning throughout a statute); *Yamaguchi v. State Farm Mutual Insurance Co.*, 706 F.2d 940, 947 (9th Cir.1983) (accord).

Furthermore, exceptionally telling evidence that Congress meant "Government" is found in the section of IRCA which immediately follows the legalization provisions at issue here. An examination of the language used in that section, which sets forth the eligibility criteria for Cuban-Haitian Adjustment, shows unmistakably that Congress knew how to require an INS determination of immigration status when it so desired. Congress stated that the benefits of Cuban-Haitian Adjustment would be permitted any alien:

> (1) who has received an immigration designation as a Cuban/Haitian Entrant . . . as of the date of the enactment of this Act, or
>
> (2) who is a national of Cuba or Haiti, who arrived in the United States before January 1, 1982 *with respect to whom any record was established by the Immigration and Naturalization Service before January 1, 1982* . . .

IRCA § 202(b)(1), (2), Pub.L. 99-603 (emphasis added). When Congress sought to specify that *INS* must make a determination of an alien's unlawful status, it did so in straightforward terms. Had it wanted to make such a specification in the legalization provision at issue, it certainly could have done so. It consciously chose not to. That intentional choice must be given effect by the regulations.

See Chevron, supra, 467 U.S. at 843, n. 9, 104 S.Ct. at 2781, n. 9; *INS v. Cardoza-Fonseca,* ___ U.S. ___, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987).[15]

2. The INS Regulation Violates Congress' Intent as Revealed in the Legislative History of IRCA

Supreme Court precedent dictates that when the plain language of the statute "appears to settle the question,"

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[15] At the hearing, defendants brought to this court's attention that the phrase "unlawful status was known to the Government" was also used in Section 501 of the Act. That section provides for reimbursement of a State by the federal government for the costs of imprisoning an illegal alien convicted of a felony by that State. The Act provides, in relevant part, that:

> (b) ILLEGAL ALIENS CONVICTED OF A FELONY—An illegal alien referred to in subsection (a) is any alien who is any alien convicted of a felony who is in the United States unlawfully and—
>
> (1) whose most recent entry into the United States was without inspection, or
>
> (2) whose most recent admission to the United States was as a nonimmigrant and—
>
> (A) whose period of authorized stay as a nonimmigrant expired, or
>
> (B) whose *unlawful status was known to the Government.*

Section 501 0f IRCA (emphasis added). This use of the term "unlawful status was known to the Government" reinforces my conclusion that Congress meant what it said in Section 245A. In Section 501, Congress could not conceivably have intended the INS to substitute the word "INS" for the word "Government." At the very least, in drafting Section 501, Congress must have meant the term "known to the Government" to be interpreted with sufficient breadth to encompass knowledge of unlawful status possessed by both the Federal Bureau of Investigation ("FBI") and the Drug Enforcement Agency ("DEA"). To exclude information possessed by the agencies which come into the closest contact with alien felons would render the provision meaningless. To do so would be to disregard the largest, most readily available and most reliable source of such information in criminal cases.

a court may "look to the legislative history to determine whether there is 'clearly expressed legislative intention' contrary to that language, which would require [a court] to question the strong presumption that Congress expresses its intent through the plain meaning of the language it chooses." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 107 S.Ct. 1207, 1213, n. 12, 94 L.Ed.2d 434 (citations omitted). In this case, rather than casting doubt on the conclusion that inexorably flows from the statutory language, the legislative history compellingly supports the plain meaning of the statute.

In light of the plain meaning of the language used, the burden is squarely on defendants to come forward with evidence of contrary intention.[16] Defendants have failed to meet that burden. Their briefs provide no tenable explanation for the substitution of the word "INS" for the word "Government," and nothing emerged at the hearing to support such a construction. The principal argument put forward by defendants for their narrow construction of the term is that the requirement works to classify nonimmigrant alien applicants for legalization into two categories—those that Congress sought to legalize and those that it wanted to exclude from amnesty. According to defendants' understanding of the legislative history:

> Nonimmigrants—like plaintiffs—who merely commit technical violations of their status—like working as students or changing employers as domestic help—are not likely to be the assimilated members of the subclass that Congress wanted to legalize.

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[16] It is not surprising that neither party can unearth any legislative materials which focus specifically and directly on the term "unlawful status was known to the Government" as of January 1, 1982. That term is self-explanatory. Both parties, however, draw from the more general legislative materials to make their arguments about what legislative intent can be divined beyond that which is readily evident from the statutory language.

Defendants' Brief at 29. This contention finds little support in the legislative history. The notion implicit in this argument—that Congress only wanted to permit those aliens who had committed flagrant violations of their legal status to be legalized—is without support.[17] Had Congress possessed such an untoward intent, it easily could have expressed it with substantially greater clarity and in far more direct terms. In short, there is no support in IRCA for drawing artificial, technical distinctions between various categories of illegal aliens.

To the contrary, both the words and the legislative history of IRCA express Congress' intent that the eligibility standards for legalization be flexible so as to effectuate the Act's broad remedial purpose. Congress ordered INS to take into consideration the special circumstances of illegal aliens and explicitly prohibited the use of "unnecessarily rigid demands for proof of eligibility for legalization." 132 *Cong.Rec.* H. 9709 (Oct. 9, 1986) (Statement of Rep. Rodino). The core guiding principle of Congress' consideration of an amnesty program was that it would be necessary—with certain very limited exceptions (*i.e.* for felons)—to legalize *all* aliens in unlawful status as of a

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[17] Defendants also argue that:

> Violations of status which are more than technical violations would normally be brought to the attention of the INS, and aliens in such situations would be in jeopardy of remaining in the United States. Such aliens would have evidenced the degree of intent to remain in the United States which Congress has made clear was intended to be benefited by the statute.

Defendants' Brief at 36-37. The idea that the seriousness of a nonimmigrant alien's violation of lawful status is somehow correlated with that alien's degree of intent to remain in the United States is without foundation in law or reason. I therefore reject defendants' attempt to justify the use of the word "INS" rather than "Government" on this basis.

certain date.[18] IRCA reflects the consensus that developed around this principle. INS' regulation, however, by rendering it nearly impossible for a nonimmigrant alien to establish such unlawful status, effectively denies legalization to an entire class of aliens. Congress never intended for the "unlawful status was known to the Government" requirement to have such an effect.

Rather, the plain language of the Act, its structure and the legislative history suggest that the "known to the Government" requirement was designed as an evidentiary safeguard against document fraud. Congress was certainly concerned about the possibility of document fraud in the legalization program. 132 Cong.Rec. S16888, 16892 (Oct. 17, 1986); 132 Cong.Rec. H10586 (Oct. 15, 1986). As a result, it created stiff penalties for immigration-related fraud as part of ICRA and placed the burden of proof of eligibility for legalization on the applicant. The "known to the Government requirement" is a central part of this anti-fraud effort. Properly understood, the term establishes an easily administered bright line rule which both satisfactorily protects against fraud yet provides the applicant with an opportunity to document his unlawful status prior to January 1, 1982. Placed in this context, it is readily apparent that the requirement is satisfied if *any* Government agency currently possesses a document that shows the applicant violated his or her legal status earlier than January 1, 1982. Because all federal government agencies are reliable sources of such documentary evidence, no legitimate purpose is served by INS' excessively narrow construction.

Furthermore, the anti-fraud purpose of the requirement also undercuts defendants' prime rationale for substituting "INS" for "Government"—that is their claim that only an

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[18] *See generally U.S. Immigration Policy and the National Interest*, 97th Cong., 1st Sess. 72-80 (Report presented to the Joint House and Senate Committees on Judiciary, Aug. 1981) ("Commission Report").

INS official can "know" that an individual has violated his lawful status. *See* Defendants' Brief at 36.[19] Obviously, knowledge—in the form of possession of a document—can evidence that the Government "knew" of an individual's unlawful status as of a certain date. Therefore, contrary to defendants' contention, it is not necessary to replace the word "Government" with the word "INS" in order to give meaning to the word "know."

3. Application of the INS Regulations

In order for an applicant to meet the INS' "known to the Government" requirement, the agency's regulations require a showing that: 1) the INS made a determination that the applicant was deportable; 2) that the alien made a clear declaration to a federal agency of his or her unlawful status, that the agency in turn informed INS and that INS placed that information in an "official file"; or 3) that INS advised another federal agency that the alein had no legal status or record. *See* 8 C.F.R. § 245a.1(d) (May 1, 1987). I agree with Judge Fish's view in *Farzad v. Chandler* that these regulations are narrow and operate in practice to prevent some valid claims. It would seem that few of those individuals who met the first requirement—agency adjudicated deportability—more than six years ago can presently be in a position to benefit from the legalization program. The second requirement essentially requires a nonimmigrant alien to make voluntary confession of "unlawful status" to a federal agency—an unlikely event. Moreover, as Judge Fish explained in *Farzad v. Chandler,* even if an applicant made such a declaration against interest, rarely will such information get into an INS official file:

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[19] Defendants contend that [t]he mere fact that an alien comes into contact with a government entity does not establish that anyone in the government *knew* that the alien was in the United States "unlawfully." Defendants' Brief at 36 (emphasis in the original).

> The further requirement that the "factual information" received from another government agency must have been in an official INS file means, as a practical matter, that this provision could rarely, if ever, be invoked. INS concedes that the vast majority of nonimmigrants do not have an official file with the INS unless and until they are somehow determined to have been in violation of their status.
>
> Even if the person were under suspicion by INS prior to January 1, 1982, it has been documented in this case that INS does not record how or when it initially learned of such a violation of status. Without such recordkeeping, INS would make it impossible, through its own practices, for an applicant to meet the burden required by the interpretation of the Act.

670 F.Supp. at 694. The third requirement adds little to the first two. I believe that the position that plaintiff Farzad took accurately sums up the effect of INS' regulations:

> . . . under the interpretation of "known to the Government" urged by INS, no alien would be eligible; he would either have been deported or would not be able to document his presence due to gaps in INS' recordkeeping.

Id. Neither in the *Farzad v. Chandler* litigation nor in this court have defendants adequately dealt with this concern.

The application of the "known to the Government" regulation also at times has been somewhat inconsistent. During the questioning of Terrance O'Reilly, INS' Deputy Commissioner for Legalization, it was disclosed that the INS has, in fact, deviated from the statute and its position that a nonimmigrant alien can only comply with IRCA if he or she can demonstrate that the information concerning his or her unlawful status in the United States was known to INS prior to January 1, 1982. Mr. O'Reilly conceded that in at least one area, involving American universities,

that INS will accept such information from such institutions showing the unlawful status of the nonimmigrant submitted by the institutions to the INS after January 1, 1982 so long as the information pertained to the period before January 1, 1982. This testimony was later confirmed by affidavit, wherein Mr. O'Reilly stated:

> the applicant for legalization can show that his or her unlawful status was known to the Government if he or she submits documentation from an appropriate school showing that (1) the school previously reported that the student was in unlawful status, and (2) the previous report was made to the Service prior to January 1, 1982, or, the appropriate school made an "immediate report" about unlawful status existing prior to January 1, 1982m as required by the regulation existing at the time, 8 C.F.R. § 214.3(g) (1981), *although the report was received by the Service after January 1, 1982.*

Affidavit of Terrance O'Reilly, March 25, 1988, at 2 (Defendants' Exhibit 4) (emphasis added). The underlying rationales for this exception were basic principles of fairness and the agency's confidence that the information was reliable even though it was not in either the government's possession or INS' prior to January 1, 1982. Testimony of Mr. O'Reilly. There is no reason to treat the plaintiffs in this case—whose unlawful status was known to the Government prior to 1982 but not to the INS—any differently from those individuals whose unlawful status was known to their school prior to January 1, 1982 but not known to either the Government or the INS as of that date.

B. *Plaintiffs Will Suffer Irreparable Injury if the Challenged Regulations are not Enjoined*

Unless this court issues a preliminary injunction, plaintiffs will be irreparably injured. The evidence is clear that the INS' "known to the Government" regulations have deterred many aliens who would otherwise qualify

for legalization from applying. If the current regulations remain in force, it is clear that the vast majority of these potential applicants will fail to file before the May 4, 1988 deadline—which is a scant seven weeks away. Because of INS' regulations, they reasonably believe that filing an application would be a futile act. Defendants' argument that plaintiffs are not irreparably injured because they can always protectively file for legalization in case the INS' regulations are ultimately invalidated is unacceptable. It ignores the substantial evidence that the challenged regulations have functioned to deter such filings. The deterrent effect of the regulation is exacerbated because INS is unwilling to waive the application fees for applying, which are considerable. Moreover, defendants have made it clear that there will be no refund of those fees if their interpretation of the law is upheld. The testimony shows that the individual plaintiffs are generally people without extensive financial resources. They will have a hard time paying the application fee. It would be foolhardy for many of them to pay the filing fee while faced with INS' "known to the Government" regulation—which makes it quite clear that they will place their money at great risk. Hence, if the status quo continues, most of them will not apply for legalization. If an otherwise eligible alien does not submit an application prior to May 4, 1988, he or she may well be forever barred from applying for legalization. 8 C.F.R. § 245a.2(a). That defines irreparable injury.

C. *The Government will Not Suffer any Harm if a Preliminary Injunction is Issued*

I reject the defendants' arguments that they will be prejudiced by an injunction. Whatever minor inconvenience they may suffer is outweighed by the substantial injury that will be suffered by organizational plaintiffs and the beneficiaries of the Act they represent. If resolution of this case is postponed, and the plaintiffs ultimately prevail in their position, they will have won a Pyrrhic victory. Whether Congress will extend the deadline to those dis-

advantaged is unpredictable and clearly is not an objective fact that realistically can be taken into account in my decision.

Moreover, I cannot conceive of any rational basis for the INS's insistence that the resolution of this issue be postponed. The INS's concern about the costs of "read-judicating" applications already rejected on "known to the Government" grounds is unpersuasive.

D. *A Preliminary Injunction is in the Public Interest*

The issuance of an injunction is clearly in the public interest because it carries out the purposes of the Act and strikes down an interpretation of the Act that is contrary to law.

REMEDY

Because the May 4, 1988 legalization program termination date is fast approaching, it is imperative that this issue be resolved promptly. Accordingly, I am hereby granting plaintiffs' motion for Declaratory Judgment. I interpret the word "Government" as set forth in Section 245A(a)(2)(B) of IRCA to mean United States Government and not simply the INS. I declare INS' regulation to be contrary to law. I enjoin the INS from any further application of the regulation. I further order that the INS take steps to notify promptly all persons affected by the regulation in question of this court's determination. The defendants must also adopt measures to ease the filing requirements of those impacted by this court's ruling to assure that they will have the opportunity to file an application prior to the May 4, 1988 deadline.

I shall retain jurisdiction to insure this decree is carried out fully and completely and to provide such other and further relief as may be necessary to implement this decision.[20]

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[20] I want to commend counsel for the parties for the highly profes-

SUPPLEMENTAL ORDER

A question has arisen with respect to the precise meaning of the term "unlawful status was known to the Government" as of January 1, 1982. In order to meet the statutory standard pursuant to this Court's March 30, 1988 Order, a nonimmigrant alien must establish that prior to January 1, 1982, documentation existed in one or more government agencies so that when such documentation taken as a whole would warrant the finding that the nonimmigrant alien's status in the United States was unlawful. Said documentation must be in the files of the government prior to January 1, 1982, or such other time as may be permitted by INS regulations. The burden is on the nonimmigrant alien to meet this standard.

SUPPLEMENTAL ORDER II

At a hearing held on April 5, 1988, plaintiffs raised a question concerning the applicability of this Court's March 30, 1988 Order to those individuals whose applications for legalization had already been administratively denied based, in whole or in part, on the Immigration and Naturalization Services' ("INS") interpretation of the phrase "unlawful status was known to the Government" as set forth in 8 C.F.R. § 245a.1(d).

Accordingly, it is hereby

ORDERED that defendants notify all individuals whose applications for legalization had been denied either by the

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sional manner in which they expeditiously handled this very difficult lawsuit. The evidentiary hearing proceeded to a swift resolution because of the cooperative efforts of both counsel for the plaintiffs and the government.

I also believe that the INS is deserving of credit for the way that it handled the legalization program entrusted to it by IRCA. Despite my holding in this case, I believe that in general the INS has taken steps to carry out the Congressional mandate.

Regional Processing Facilities or by the Legalization Appeals unit on the basis of 8 C.F.R. § 245a.1(d) of the terms of this Court's March 30 and April 5, 1988 Orders, and it is further

ORDERED that defendants reopen, at no cost to the applicants, the cases of these individuals, and reconsider such cases under the "known to the Government" standard consistent with this Court's March 30 and April 5 and 6 Orders, and it is further

ORDERED that in the event that the employment authorization granted to these individuals has expired, defendants shall extend such employment authorization for an additional period until a final decision on the legalization application has been reached.

SUPPLEMENTAL ORDER III

On March 30, 1988, this Court issued a Memorandum Opinion and Order in the captioned case. Subsequently, on April 4, defendants filed a "Notice of Measures To Be Taken In Response To Court's Order" and plaintiffs filed a Memorandum in Opposition thereto. A hearing was held on April 5, 1988 and following consideration of the documents filed and the arguments of counsel, Supplemental Orders were entered on April 5 and April 6, 1988. At the April 5 hearing, plaintiffs orally moved for summary judgment and both plaintiffs and defendants stipulated that no material facts were in dispute and that the matters raised only issues of law. Defendants also orally moved for a stay of the Court's Order pending appeal.

Following consideration of these motions, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted under the terms and conditions of the March 30, April 5 and April 6, 1988 Orders.

It is further

ORDERED that the INS is hereby permanently enjoined from any further application of the phrase "unlawful status was known to the government," as set forth in 8 U.S.C. Section 1255a, except in conformance with this Court's Orders, and it is further

ORDERED that the defendants' motion for a stay of this Court's Orders pending appeal is hereby denied, and it is further

ORDERED that, following the date of this Order, defendants permit applicants for legalization pursuant to the "known to the Government" standard for eligibility to file their applications up to the existing May 4, 1988 deadline, or any new deadline established by Law, without the imposition of a filing fee until such time as this Order becomes a final and binding decision or the Defendants have acquiesced in this Court's rulings.

SUPPLEMENTAL ORDER IV

Upon consideration of the oral arguments and documents presented by plaintiffs and defendants at the hearings held on April 28 and 29, 1988,

IT IS HEREBY ORDERED that the INS shall be enjoined from failing to process the legalization applications previously filed, or hereafter filed with INS, Qualified Designated Entities ("QDEs") or United States consular officers abroad on or before May 4, 1988, by nonimmigrant aliens absent from the United States whose applications for legalization had been denied by INS under INS's prior construction of the "known to the Government" provision of Section 201(a)(2)(B) of the Immigration Reform and Control Act of 1986 ("IRCA") or who were informed either by INS or QDEs that, based on such construction, their applications would be denied or would be recommended for denial;

IT IS HEREBY FURTHER ORDERED that such applications shall be accepted by INS without the imposition

of a filing fee until such time as this Order becomes a final binding decision or the Defendants have acquiesced in this Court's rulings. In addition, INS shall accept such applications under the so-called "Bare Bones" filing procedures and shall grant temporary work authorization to such applicants in keeping with its policies respecting all other legalization applications.

IT IS HEREBY FURTHER ORDERED that INS shall continue to use its best efforts to notify all Legalization Offices and QDEs of the terms of this Order;

IT IS HEREBY FURTHER ORDERED that INS shall continue to use its best efforts to contact and to communicate the terms of this Order to the nonimmigrant aliens affected by the terms of this Order, including, without limitation, those nonimmigrant aliens whose names and addresses are contained in INS files as a result of said nonimmigrant aliens having filed a legalization application or having contacted INS with respect to the filing of a legalization application, where the INS has such information;

IT IS HEREBY FURTHER ORDERED that the INS shall parole into the United States for the purpose of filing their legalization applications any aliens and their immediate families who were deported or accepted voluntary departure as a result of the INS's prior construction of "known to the Government" requirement of Section 201(a)(2)(B) of IRCA; and

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction to assure this Order is carried out fully and completely and to provide such other and further relief as may be necessary to implement this Order.

SUPPLEMENTAL ORDER V

Upon consideration of the oral arguments presented by plaintiffs and defendants at the hearings held on April 28 and 29, 1988,

IT IS HEREBY ORDERED THAT INS shall be enjoined from denying legalization to nonimmigrant aliens who contend that they violated their nonimmigrant status prior to January 1, 1982 by failing to comply with the mandatory quarterly or annual registration requirements of Section 265 of the Immigration and Nationality Act, 8 U.S.C. § 1305 (1952), if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization. With respect to any applicant making a claim based upon a violation of Section 265, INS shall be required to supply to such applicant prior to adjudication any and all agency records bearing on such claims, and the presence or absence of any such files, including but not limited to the microfilmed I-53 files now maintained by the INS for the period January 1, 1980—January 30, 1980, all of which shall be considered as evidence bearing on the credibility of the applicant's claims. These applications shall be accepted and processed by INS without the imposition of filing fee until such time as this Order becomes a final binding decision or the Defendants have acquiesced in this Court's rulings. In addition, the INS shall accept such applications under the so-called "Bare Bones" filing procedure and shall grant temporary work authorization to such applicants in keeping with its policy respecting all other legalization applications;

IT IS HEREBY FURTHER ORDERED that the INS shall continue to use its best efforts to notify all Legalization Offices and all Qualified Designated Entities of the terms of this Order;

IT IS HEREBY FURTHER ORDERED the INS shall continue to use its best efforts to contact the nonimmigrant aliens affected by the terms of this Order and to communicate the terms of this Order to such nonimmigrant aliens;

IT IS HEREBY FURTHER ORDERED that the INS will make available in Court for examination by plaintiffs on Monday May 2, 1988, Cecil Christian, Director, Records Management Board, INS or such other person or persons knowledgeable regarding INS retention of AR-11, 1-53's or data relating to same on microfilm or magnetic tape; and

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction to assure this Order is carried out fully and completely and to provide such other and further relief as may be necessary to implement this Order.

SUPPLEMENTAL ORDER VI

Upon consideration of defendants' oral motion made at the hearing on May 2, 1988, for a stay pending appeal of Supplemental Orders IV and V, issued on April 29, 1988, it is hereby

ORDERED that defendants' motion be and is denied; and

IT IS HEREBY FURTHER ORDERED that defendants retain any magnetic tapes containing information relating to the filing or failure to file AR 11 (Alien Registration) cards, and the microfilmed files relating to the period January 1, 1980—January 30, 1980. Such tapes and files shall be retained for a period of eight months following the date of this order and a representative sample of the tape with identifying information about particular aliens deleted shall be made available to plaintiffs and shall be made a plaintiffs' exhibit in this case.

SUPPLEMENTAL ORDER VII

On April 28, 1988, this Court granted Plaintiffs' Motion to Admit Additional Co-Counsel, which motion adopted and incorporated arguments made and evidence presented in support of Intervenors' Motion to Compel Compliance and/

or Modify Permanent Injunction and the associated memorandum ("Intervenors' Motion"). On April 28, 1988 defendants filed an Opposition to Intervenors' Motion. Also on April 28, 1988 Plaintiffs filed a Notice of Evidence of defendants's Failure to Comply with the Court's Orders and Renewal of Request to Toll May 4, 1988 Filing Deadline, with Additional Declarations and Affidavits in Support thereof filed on April 29, 1988. On May 2, 1988, Plaintiffs filed a Memorandum in Reply to Defendants' Opposition to Intervenors' Motion.

On May 2, 1988, a hearing was held and testimony given by Terrance O'Reilly and Cecil Christian. At that hearing, intervenors withdrew their Motion to Intervene. Following the consideration of the documents filed, the arguments of counsel, and the testimony given,

IT IS HEREBY ORDERED that Plaintiffs' request to toll the May 4, 1988 filing deadline for the class of aliens affected by this Court's prior orders be and is denied, and

IT IS FURTHER ORDERED that defendants immediately take all reasonable steps to publicize this Court's Orders of March 30, 1988, April 5, 1988, April 6, 1988, and April 29, 1988, and to encourage all aliens who may be eligible for legalization under the Court's prior orders to apply before the May 4, 1988 deadline, and

IT IS FURTHER ORDERED that defendants immediately take corrective action to notify all Legalization Offices and Regional Processing Facilities where noncompliance with this Court's prior orders has been attested to in the declaration or affidavits submitted by Plaintiffs, or where defendants independently have been informed of any noncompliance, of the proper procedure for acceptance and processing of "known to the Government" applications, pursuant to this Court's prior orders, and to eradicate any confusion which may still exist among officials at such Legalization offices and Regional Processing Facilities regarding this Court's prior orders, and

make reasonable efforts to contact those aliens whose applications may not have been accepted or who were turned away as a result of such noncompliance and process the applications of such aliens, and

IT IS FURTHER ORDERED that defendants retain any information with regard to noncompliance with this Court's orders at any time from the date of Order through and after the May 4, 1988 filing deadline, and make such information available to Plaintiffs upon demand, and

IT IS FURTHER ORDERED that this Court shall continue to retain jurisdiction to assure that this Order and all prior Orders in this case are carried out fully and completely and to provide such other and further relief as may be necessary to implement said Orders, including, but not limited to, Plaintiffs seeking relief from this Court in individual cases covered by one or more of this Court's Orders where an alien can demonstrate that he/she failed to exercise his/her right to apply for legalization by May 4, 1988 because he or she was misled directly or indirectly by the action or inaction of the INS or its agents, including, but not limited to, Qualified Designated Entities or because he/she was not allowed or dissuaded from filing an application by INS or its agents, including, but not limited to, Qualified Designated Entities, so long as relief is sought by a filing with this Court, with notice to the INS, prior to August 31, 1988, and the alien can establish that he/she is not otherwise ineligible for legalization,

IT IS FURTHER ORDERED that this Order shall be appropriately publicized by the Plaintiffs and the Defendants and,

IT IS FURTHER ORDERED that Defendants' oral motion for a stay of Supplemental Orders VI and VII be and is denied.

SUPPLEMENTAL ORDER VIII

In an effort to effectuate and facilitate the implementation of Supplemental Order VII, it is hereby

ORDERED that the following Protective Order be entered.

1. Except as otherwise ordered by this Court, all documents, motions, affidavits, statements, declarations, forms, interrogatories, depositions, testimony, information, and pleadings produced, given, or filed under Supplemental Order VII in this action, shall be filed under seal with the Court and shall be treated as "CONFIDENTIAL INFORMATION" as outlined below.

2. "CONFIDENTIAL INFORMATION" subject to this Order shall be used solely and exclusively for purposes of this case in accordance with the provisions of this Order except as provided in this Paragraph. Such information shall not be used in or for other cases, proceedings, or disputes, or for any criminal, deportation, or other immigration-related purpose whatsoever except for any criminal proceedings arising as a result of an alien knowingly and willfully falsifying, misrepresenting, concealing, or covering up a material fact or making any false, fictitious, or fraudulent statements or representations, or making or using any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.

3. Except with the prior written consent of the party asserting confidential treatment or prior Order of this Court, any "CONFIDENTIAL INFORMATION," and any information contained in, or derived from, any such information, may not be disclosed other than in accordance with this Order and may not be disclosed to any person other than:

(a) All Counsel and their staffs involved in any way with this litigation;

(b) The Court and its staff; and

(c) Sworn officers and employees of the U.S. Department of Justice involved in processing and adjudicating legalization applications.

4. All "CONFIDENTIAL INFORMATION" obtained or received by any persons subject to this Order (including copies thereof), and all notes, drafts, memoranda, work papers, and other materials that contain data or other information obtained by means of the "CONFIDENTIAL INFORMATION" must be destroyed, returned to counsel for the other party, or retained in accordance with this Order. If destroyed, or retained, counsel shall, within a reasonable time, provide the Court with a declaration to that effect.

5. The inadvertent or unintentional disclosure of "CONFIDENTIAL INFORMATION" shall not be construed to be a waiver of confidentiality.

6. A breach of the provisions of this Protective Order shall be subject to sanctions, in the discretion of the Court.

7. The provisions of this Protective Order shall remain in force after the entry of final judgment (including any appellate proceedings.)

SUPPLEMENTAL ORDER IX

On June 6, 1988, a hearing was held concerning the procedures for implementing this Court's Supplemental Order VII with respect to those aliens affected by the Court's prior orders who did not file by the May 4, 1988 legalization deadline. Following consideration of the documents filed and the arguments of counsel,

IT IS HEREBY ORDERED that defendants immediately provide one copy of the attached form and press release, which are hereby approved, to all major wire services and to all Qualified Designated Entities; and

IT IS FURTHER ORDERED that plaintiffs immediately provide one copy of the attached form and press release to *Interpreter Releases* and to the American Immigration Lawyers Association; and

IT IS FURTHER ORDERED that, within five (5) business days of receipt from plaintiffs, defendants shall provide the copies of the forms and press releases which have been supplied by plaintiffs to (i) all legalization offices remaining open following the date of this Order and (ii) all INS district offices, and sub-district offices. Defendants shall notify plaintiffs promptly when the supply of forms and press releases at any of such offices has been exhausted; and

IT IS FURTHER ORDERED that the distribution of such forms and press releases shall be exempt from the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), including, without limitation, the requirement of approval by the Office of Management and Budget;

IT IS FURTHER ORDERED that nothing in this Order shall be construed in any way as requiring defendants to provide assistance or counseling to aliens or to their representatives with respect to the forms or press releases.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

AYUDA, INC. *et al.*,

Plaintiffs

v.

EDWIN MEESE III, *et al.*,

Defendants

Statement of Reasons for Not Applying for Legalization Prior to May 5, 1988 And Statement Of Eligibility For Legalization

Applicant: Do not write above this line. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. *Fill in with typewritter or print in black letters in ink.*

THE INFORMATION PROVIDED IN THIS APPLICATION IS CONFIDENTIAL AND MAY ONLY BE USED TO MAKE A DETERMINATION ON THE ELIGIBILITY OF THE APPLICANT TO FILE A LATE APPLICATION FOR LEGALIZATION.

1. I hereby provide the following statement of reasons why I did not apply for legalization prior to May 5, 1988. I entered the U.S. as a nonimmigrant prior to January 1, 1982 and my unlawful status was known to the Government as of January 1, 1982 because

☐ I willfully failed to file annual or quarterly reports with the INS prior to 1982.

☐ A document or documents existed prior to January 1, 1982 in the files of one or more governmental agencies that indicated my unlawful status.

2. Name (Last, First, Middle Initial)

3. Date of Birth

4. Other names known by

5. Telephone Numbers
Home: Work:

6. Home Address in the U.S.

7. Mailing address in the U.S.

8. Country of Citizenship

9. Place of Birth

10. Have you previously applied for legalization?

☐ No ☐ Yes (if "Yes" give date, place of filing, and final disposition, if known)

11. Do you have any records with INS?

☐ No ☐ Yes ☐ Don't Know

If yes, give number(s)
A#
Other

12. When was your last entry prior to January 1, 1982?

13. Manner of Entry (Visitor, Student, Crewman, etc.)
☐ With visa ☐ Without visa

14. Type of Visa Entered on Prior to January 1, 1982

15. Date Authorized Stay in U.S. Expired Prior to Januar 1, 1982

16. What dates were you absent from the United States after January 1, 1982?

17. I did not exercise my right to apply for legalization before May 5, 1988, because

☐ An agent of the INS at _____ (location) informed me, or my representative or attorney, who informed me, that I was not eligible to apply because my illegal status in this country before January 1, 1982 was not known to the INS. The agent's name, if known, was _____. The name of my representative or attorney, if applicable, was _____.

☐ An employee at Qualified Designated Entity _____ (name and QDE) located at _____ informed me, or my representative or attorney, who then informed me, that I was not eligible to apply because my illegal status before January 1, 1982 was not known to the INS. The employee's name, if known, was _____. The name of my representative or attorney, if applicable, was _____.

☐ I was not aware that the regulation making me ineligible for legalization was invalidated because (explain)_____

_____

_____

_____

☐ Other (explain)_____

_____

_____

_____

18. Did you learn that you were eligible to apply for legalization before May 5, 1988?
☐ Yes ☐ No

If yes, why did you fail to apply?

_____

_____

_____

_____

19. To the best of my knowledge and belief I am not otherwise ineligible for legalization.

I declare under penalty of perjury that the foregoing is true and correct.

Applicant (Signature) _____

Date _____

CERTAIN ILLEGAL ALIENS MAY STILL APPLY FOR AMNESTY
(Washington, D.C.)

This release is addressed to those illegal nonimmigrant aliens who were led to believe that they had no right to seek amnesty under the Immigration Reform and Control Act, which by its terms expired May 4, 1988. Federal Judge Stanley Sporkin in Washington, D.C. ruled that before midnight, August 31, 1988, certain nonimmigrant aliens whose unlawful immigration status was "known to the Government" before January 1, 1982, may seek permission to file a late application for amnesty with the United States District Court for the District of Columbia. Applicants must show they were misled directly or indirectly by the INS or its agents, including Qualified Designated Entities (QDE's) or not allowed to apply or dissuaded from applying for legalization by INS or its agents, including QDE's. Judge Sporkin stated that the burden is on the applicant to establish eligibility for legalization.

For example, one group of potentially eligible aliens are those who worked illegally in violation of a student visa or other work-restricted visa, if a tax return, social security form, or some other record of employment was on file with the government agency before January 1, 1982. Another group includes all nonimmigrant aliens who willfully failed to file annual or quarterly alien registration reports with the government prior to 1982. In addition, there are other ways the alien could have violated his or her visa.

Aliens who believe they may be eligible for amnesty under the Court's ruling must submit declarations to be filed with the Court by plaintiff's counsel explaining why they missed the May 4, 1988, amnesty application deadline. Those declarations must establish one of these reasons for not applying: either (1) the INS, or any of its agents, such as a Qualified Designated Entity advised the alien that he

or she would not qualify or turned away the applicant; or (2) the INS or any of its agents misled the alien; or (3) the alien was not aware of the changes in the INS regulation making him/her eligible for amnesty. Judge Sporkin emphasized that all requests for amnesty after the deadline will be maintained in confidence, and that the information contained in those requests may not be used by the INS to initiate or support any deportation proceeding even if the alien's application is later denied.

The plaintiffs' lawyers in the case, entitled *Ayuda v. Meese,* have prepared a form that is available, free of charge, to all nonimmigrant aliens who believe they may be eligible and who wish to show that they are eligible to apply for amnesty. Copies of these forms may be obtained by contacting any INS Legalization Office, plaintiffs' attorneys, any Qualified Designated Entity, or an immigration counselling group. Requests by mail should include a stamped self-addressed envelope. Completed forms must be received by plaintiffs' lawyers before the end of August for submission to the Court.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Sporkin

AYUDA, INC., *et al.*

Plaintiffs,

v.

EDWIN MEESE, III, *et al.*

Defendants.

FILED

AUG 18 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUPPLEMENTAL ORDER X

The court being unable to resolve certain issues raised by the parties in this action prior to its summer recess,

HEREBY ORDERS that a hearing be held on September 6, 1988, at 2:00 p.m. in a courtroom to be assigned on that date,

HEREBY FURTHER ORDERS that on or before the close of business on Tuesday, August 30, 1988, the parties shall submit a proposed agreed-upon agenda of those items which they believe the court should consider at the September 6th hearing. The proposed agreed upon agenda should list only the items and should not contain argument, and

HEREBY FURTHER ORDERS that all deadlines previously set forth in prior Orders of the court are hereby

extended until a date which is to be fixed at the September 6th hearing.

Dated: 8/13/88

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*

Plaintiffs,

v.

Edwin Meese, III, *et al.*

Defendants.

FILED

SEP 27 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND SUPPLEMENTAL ORDER XI

On March 30, 1988, this Court issued a Memorandum Opinion and Order which held that the Immigration and Naturalization Service's ["INS"] interpretation of "known to the government" was contrary to law. *See* 8 U.S.C. Sec. 1255(a) (2) (B). That Opinion fully addressed the issues of INS's interpretation of "known to the government," class representation and class certification and concluded that the four organizational plaintiffs had standing to fully litigate the issues now before the Court. Following that Opinion, the Court has had opportunity to review various issues that have arisen from its initial determination. Over the past seven months this Court has issued a total of ten Supplemental Orders, not including this one, to assure the original ruling of the Court would be made fully effective.

The original decision and a number of those Supplemental Orders have not been appealed and concededly stand as the law of the case and are binding on all parties to this action. Further, even as to those Supplemental Orders that have been appealed, they are now in effect since none of them, as of this time, has been stayed by any court order.

I am now in the process of determining what, if any, individuals have been misled to their detriment by INS's erroneous interpretation and related government actions and to what extent relief can be given based on my prior rulings taking into account *INS v. Pangilinan*, 108 S. Ct. 2210 (1988). Although, the government alleges, based on *Pangilinan*, that I do not have the power to extend a statutory deadline, this Court does have the clear authority and responsibility and duty to determine to what extent, if any, persons may have been prejudiced or otherwise harmed by the government's application of its erroneous regulation, and after making such determinations to decide what relief, if any, may be appropriate. Indeed, the Order accompanying the March 30, 1988, decision specifically stated, "this court shall retain jurisdiction to assure this decree is carried out fully and completely and to provide such other and further relief as may be necessary to implement this decision." Therefore, even assuming that the Supreme Court's recent ruling in *Pangilinan* precludes certain remedial avenues, an issue I do not have to determine at this time, it is clear I possess the authority to order other remedies with respect to those who have been injured by the government's actions.

Having concluded that the government has materially misinterpreted the law and that the Court is not precluded from granting a remedy, the next step is to determine who the injured parties are and the extent to which their injuries were caused by the government's conduct and need to be remedied.

I have concluded that exceptional circumstances exist making it imperative to appoint one or more Special Master(s), pursuant to Rule 53 of the Federal Rules of Civil Procedure. This conclusion is based on the particular facts and circumstances of this case and upon the government's outright refusal to conduct an inquiry on its own in order to identify those persons who might have been injured by its impermissive interpretation of the statute and because of the diverse nature and extent of the prejudice and injuries that might have been sustained by these persons. Moreover, in view of the government's failure to appeal the Court's decision, thus allowing that decision to become final, while continuously insisting that no individual is entitled to any relief as a matter of law, it is clear that the government is not willing nor disposed to conduct the fair and impartial inquiry that is required by the findings I have made in this case. Therefore, it will be the responsibility of such Special Master(s) to conduct the inquiry I have found is required in this case.

Pending the conduct of this inquiry, I find it is premature to consider the other motions now pending before me. This would include Plaintiffs' Motion For Reconsideration, Defendants' Motion To Vacate The Orders Permitting The Relief Of Submitting Late Applications, and Plaintiffs' Motions For Leave To Amend Complaint And For Class Certification. It is my view that until I know whether anybody is embraced by my Opinions and Orders, and the extent and nature of any harm sustained by any person, it would not be fruitful to pursue the other issues that have been presented by the parties. This is particularly so with respect to those motions which ask me to prescribe a particular remedy before the issues I seek to have decided have been fully explored.

In view of the foregoing, it is hereby

ORDERED that, in light of the exceptional circumstances discussed above, one or more Special Master(s) shall

be appointed, pursuant to Rule 53 of the Federal Rules of Civil Procedure. Such Special Master(s) shall have the authority to conduct hearings, if necessary, and to make findings of fact and recommendations as to whether the plaintiffs or any person who derived benefits from this Court's decision of March 30, 1988, and Supplemental Orders, was in fact injured, prejudiced or misled by the government's impermissive definition of "known to the government," which this Court held to be invalid on March 30, 1988, and to further determine and recommend to this Court what, if any, relief the Court is authorized to and should order to remedy the harm sustained by any person(s) covered by this Court's Orders issued on March 30, 1988, and subsequently.

IT IS FURTHER ORDERED that the procedures before the Special Master or Masters will be as follows:

1. The Court shall appoint one or more Special Master(s) who shall conduct such investigations as the Court shall authorize along with hearings and such other proceedings pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

2. The Special Master(s) shall review all the facts surrounding all individuals who may be covered by this Court's March 30, 1988, Order and all subsequent Orders, who shall file with this Court, the parties or the Special Master(s), prior to October 31, 1988, "A Statement Of Reasons for not Applying for Legalization Prior to May 5, 1988" ["Statements"]. The Special Master(s) is authorized, with approval of the Court and upon notice to the parties, to take whatever steps the Special Master(s) believes necessary to identify those persons who may be the beneficiaries of the Court's Opinions and Orders.

3. Counsel for Plaintiffs shall periodically submit under seal or otherwise, completed aliens' Statements

and such other relevant information to the Court and to counsel for Defendants.

4. Following receipt by the Court, all such information will then be forwarded to the appropriate Special Master. Upon request of either of the parties, or upon his or her own determination, the Special Master may conduct a fact finding investigation, hold hearings, and render such reports to the Court as the Special Master finds consistent with the Orders of this Court and such other determinations as may be made by this Court. In any instance where a request by one of the parties is made of the Special Master to conduct a hearing and that request is denied by the Special Master, the said party has ten (10) days to appeal that adverse decision to the Court. In determining the place of any hearing, the Special Master shall take appropriate steps to minimize expense to all parties and shall consider all requests for a convenient forum. The proceedings before the Special Master(s) need not be transcribed unless such transcription is requested by either Plaintiffs or Defendants, or the Special Master makes the determination him or herself.

5. An alien who is to be examined by a Special Master will be entitled to representation of his/her choice and a representative delegated by counsel for the Plaintiffs, and Defendants may be present at any hearing at the discretion of the Special Master unless otherwise ordered by the Court. The representation provided through counsel for Plaintiffs shall be paid, unless ordered otherwise by the Court, by the government at a rate of $40.00 per hour plus travel expenses at the standard *per diem* government rate. Such representation may be made by a student in an accredited law school, who has been instructed with respect to the handling of the matters in question, and who, at all times, shall operate under the supervision of an attorney admitted to practice in one of

the fifty states or the District of Columbia. Such supervision shall be compensated at the rate set forth in Paragraph 8. The names of all representatives who will be acting on behalf of counsel for the Plaintiffs shall be provided to the Court and to counsel for Defendants. If representation is provided by a representative of the alien's choice, such alien shall bear the cost of such representation. Defendants may also have a representative present at all Special Master(s)' hearings. Counsel for the parties have the right to question an alien at the hearing subject to the provisions of Rule 53(c). The alien shall be questioned under oath by counsel for the parties and/or by the Special Master.

6. The Special Master shall conduct such investigations as he or she deems consistent with the Orders and directions of this Court and make such findings of fact and recommendations for relief, if any, at such times and under such conditions as the Court shall direct.

7. The Special Master shall notify the Court and counsel for the parties of his or her investigative findings of fact and recommendations for relief, if any, at such times and under such conditions as the Court shall direct.

8. Unless otherwise ordered by the Court, a Special Master shall be paid at a rate of $65.00 per hour but not to exceed $500.00 per day, plus travel expenses at the standard per idem rate established by the government. Pursuant to 28 U.S.C. Section 2412(a), all costs shall be borne by the government.

9. Before any fees or costs may be paid on an interim or final basis, an application for such fees and costs must be filed with, and approved by, the Court.

IT IS FURTHER ORDERED that pending receipt of reports from the Special Master(s), and a final decision by

this Court regarding further actions to be taken, as well as what, if any appropriate final relief shall be ordered, the Court reserves the right to enter such interim and other relief as necessary to maintain the status quo or otherwise implement this as well as the other prior Court decisions and orders in this matter.

IT IS FURTHER ORDERED that Supplemental Order VII and all unresolved motions now before the Court shall be held in abeyance pending the determinations set forth above.

SO ORDERED, this 27th day of September, 1988.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Edwin Meese, III, *et al.*

Defendants.

FILED

OCT 28 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUPPLEMENTAL ORDER XII

Pursuant to Supplemental Order XI and in accordance with Federal Rule of Civil Procedure 53, it is

ORDERED that Irving M. Pollack of Wheaton, Maryland, shall be and hereby is appointed Lead Special Master.

It is FURTHER ORDERED that Mr. Pollack shall be responsible for the implementation and supervision of the inquiry set forth in this Order and in Supplemental Order XI. Accordingly, Mr. Pollack shall nominate, if he deems it necessary, additional candidates to serve as Special Master pursuant to Supplemental Order XI subject to notice to, and comment by, the parties. If appointed by the Court, such additional Special Master(s) shall serve at the direc-

tion of the Court but under the day to day oversight of Mr. Pollack.

It is FURTHER ORDERED that as Lead Special Master Mr. Pollack, with the assistance of such other Special Master(s) appointed by the Court, shall, pursuant to the procedures specified in Supplemental Order XI, determine the following with respect to those individuals who have filed a Statement of Reason for Not Applying for Legalization prior to May 5, 1988, and Statement of Eligibility for Legalization with this Court or with the parties to these proceedings:

1. (a) Did the claimant file an application for amnesty by May 4, 1988, pursuant to 8 U.S.C. Sec. 1255a(a)(1)? If the answer is "Yes," the Special Master need not continue with the following questions and should submit the claimant's case to the Court.

(b) If the answer to 1(a) is "No," was the claimant dissuaded from filing for amnesty, pursuant to 8 U.S.C. Sec. 1255a(a), because of misinformation received, either directly or indirectly, from the Immigration and Naturalization Service ("INS") or its agents as to the INS's impermissive interpretation of "known to the government," *id.* at Sec. 1255(a)(2)(B).

2. If the answer to 1(a) is "No" and the answer to 1(b) is "Yes," has the claimant established prima facie eligibility for legalization on the basis of information contained in the "Statement of Reasons" and any other evidence that may be presented in the course of the Special Masters proceedings? This question is to be answered by determining whether the claimant has made a prima facie showing on the following questions:

(a) Did the claimant enter the United States with inspection on a valid nonimmigrant visa prior to Jan-

uary 1, 1982, whose nonimmigrant stay did not expire through the passage of time prior to January 1, 1982?

(b) Prior to January 1, 1982, did the claimant violate the conditions of his or her lawful admission into the United States. If so, (i) in what manner did the claimant violate the conditions of his or her lawful status in the United States, and (ii) was the claimant's "unlawful status known to the government" of the United States, 8 U.S.C. Sec. 1255a(a)(2)(B), as interpreted by the Court in this litigation?

(c) Did the claimant reside "continuously" in the United States in an unlawful status since January 1, 1982, within the meaning of 8 U.S.C. Sec. 1255a(a)(2)(A) as that term has been validity interpreted by INS and the federal courts?

(d) Has the claimant been "continuously physically present" in the United States since November 6, 1986, within the meaning of 8 U.S.C. Sec. 1255a(a)(3) as that term has been validly interpreted by INS and the federal courts?

(e) Is the claimant admissible as an immigrant within the meaning of 8 U.S.C. Sec. 1255a(a)(4)?

3. If questions 1(b) and 2(a)-(e) are answered in the affirmative, what relief, either temporary or permanent, if any, is necessary to correct the impermissive actions of the INS with respect to said claimant, taking into account in fashioning such recommendation all matters including, *inter alia*, whether the claimant is currently in deportation proceedings or prohibited by law from being gainfully employed.

It is FURTHER ORDERED that within ten (10) days after each inquiry has been completed by a Special Master notice of that fact shall be transmitted to Mr. Pollack who shall, within ten (10) days or at such other time as the Court may direct, submit a written report to the Court

supporting the findings made as required by the questions set forth above.

It is FURTHER ORDERED that this Court shall retain jurisdiction to make all final and preliminary determinations, to assure this decree is carried out fully and completely and to provide such other and further relief as may be necessary to implement this decision.

SO ORDERED this 28 day of October, 1988.

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Richard Thornburgh, *et al.*,

Defendants.

FILED

JUN 29 1989

Clerk, U.S. District Court
District of Columbia

Memorandum Opinion

Before the Court is Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders. The defendant, Immigration and Naturalization Service ("INS"), has filed an opposition to plaintiffs' motion. In addition, the United States Department of State has filed a letter expressing its interest in the outcome of this matter. *See* **Supplemental Memorandum In Support of Defendants' Memorandum**, Letter of James G. Hergen, Assistant Legal Adviser for Consular Affairs, U.S. Department of State ("Letter of Interest"). This matter has been fully briefed, and a hearing was held on April 10, 1989.

I. BACKGROUND

At issue in the present motion is the status of various holders of "A" and "G" non-immigrant visas. The "A" visa is provided by the United States to accredited foreign diplomats (and their families), government officials or employees (and their families), and such officials' attendants, servants and personal employees (and their families). *See* 8 U.S.C. sec. 1101(a)(15(A)); *see also* 1 Gordon and Mailman, *Immigration Law and Procedure* at sec. 13.01 - 13.04. The "G" visa is provided by the United States to accredited foreign government representatives to an international organization (and their families), the officers or employees of the international organization (and their families), and the attendants, servants, and personal employees (and their families) of any such representatives, officers or employees. *See* 8 U.S.C. sec. 1101(a)(15)(G).

The eligibility requirements for legalization under the Immigration Reform and Control Act ("IRCA"), require that an alien establish that he or she violated his or her non-immigrant visa prior to January 1, 1982 and that this "unlawful status was known to the government." *See* 8 U.S.C. sec. 1255(a)(2)(B); *see also Ayuda v. Meese*, 687 F. Supp. 650, 664-65, 666 (D.D.C. 1988). On several occasions, "A" and "G" visa holders have sought legalization pursuant to IRCA. *See* **Memorandum of Points and Authorities in Support of Plaintiffs' Motion**, Attachments A-D (**"LAU Decisions"**). On at least four occasions, "A" and "G" applicants were denied legalization by the INS Legal Appeals Unit (LAU). *Id.*

Plaintiffs contend that unauthorized employment by an "A" or "G" visa holder constitutes the requisite "unlawful status" necessary for legalization. *See* 8 U.S.C. sec. 1255(a)(2)(B); *see also Ayuda v. Meese*, 687 F. Supp. 650, 664-65, 666 (D.D.C. 1988). Plaintiffs therefore urge this Court to find that INS's denial of legalization of "A" and

"G" visa holders, who have admittedly violated the terms and/or conditions of their visas by engaging in unauthorized employment, is contrary to IRCA and in violation of the Orders of this Court.

At the hearing held on April 10, 1989, INS did not contest plaintiffs' assertion that the aliens in question engaged in unauthorized employment in violation of the terms and conditions of their visa. There is no dispute that unauthorized employment is inconsistent with "A" or "G" visa status. Rather, INS takes the position that such unauthorized employment, without further action by the Department of State, does not constitute "unlawful status."[1]

II. DISCUSSION

The sole issue before me is whether an "A" or "G" visa holder, who has engaged in unauthorized employment, satisfies the "unlawful status" requirement. A careful analysis reveals that the defendant's position is correct; "A" or "G" visa holder's status, except in limited circumstances, cannot be characterized as illegal unless and until appropriate action is taken by the Department of State.

In most instances the immigration laws provide that the mere violation of the terms or conditions of lawful entrance into the United States places an alien in illegal

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[1] Indeed, this was the very basis of the LAU's holding which denied various "A" and "G" visa holders legalization. *See* **LAU Decisions**. Plaintiffs, however, assert that the LAU denials were based on a determination that the aliens' unlawful status was not known to the government. It is clear that plaintiffs' misconstrue the basis of the LAU's rulings. The LAU did not base its decision on whether the aliens' illegal status was known to the government. Rather, the LAU determined that the aliens did not have the requisite illegal status, i.e. the aliens failed to meet the unlawful status requirement. In fact, one LAU decision cited by plaintiffs specifically fails to address the known to the government issue. In that decision, the LAU finds that its determination that the alien's status is not illegal "renders moot the issue of whether applicant's illegal employment was known to the government." **LAU Decision**, attachment A at 3.

status, i.e. the alien is immediately subject to deportation proceedings. *See* 8 U.S.C. sec. 1251(a)(9). Such is not the case with "A" and "G" visa holders. This is evidenced by the fact that "A" or "G" visa holders are not subject to deportation unless and until the Secretary of State withdraws recognition of their "A" or "G" status. *See, e.g.*, 8 U.S.C. sec. 1251(e); *see also* 22 C.F.R. sec. 41.22(f); 1 Gordon and Mailman, *Immigration Law and Procedure* at Sec. 13.01 & 13.04.[2]

The Department of State has provided a Letter of Interest that supports and elucidates the position taken by INS. The Letter of Interest sets forth the unique status of "A" and "G" visa holders and the deference afforded the Department of State in this area:

> The Department of State decides the lawfulness or unlawfulness of an A/G visa holder's status. An A/G visa holder is lawfully admitted to the United States and has lawful status for only so long as the Secretary of State recognizes the A/G visa holder as being entitled to such status. Termination of recognition of an A/G visa holder's status is committed to the discretion of the Department of State. *See, e.g.*, 22 C.F.R. sec. 41.22(f). In addition, in order for an A-1 or G-1 visa holder to be deported, the INS must first obtain the approval of the Secretary of State (except in certain limited cases). 8 U.S.C. sec. 1251(e).

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[2] INS's own guidelines attest to the deference due the Department of State on this issue:

> [INS] is [ ] not in a position to consider ["A" and "G" visa holders] who, without having been granted change in status, engage in employment without permission as being in violation of status *so long as they continue to be accepted by the Secretary of State as having official status.*

INS Operations Instructions Sec. 214.2(a) (rev. 8/16/72) (emphasis added).

* * *

> Although the Department of State considers unauthorized employment by A/G visa holders to be inconsistent with their A/G status, the Department of State does not consider such unauthorized employment in and of itself as rendering the A/G visa holder's status unlawful. *Despite unauthorized employment by an A/G visa holder, the Department of state nevertheless has the discretion to consider such A/G visa holder entitled to that status and not in violation of the terms and conditions of status.*

Letter of Interest 1-2.

To put it succinctly, an "A" or "G" visa holder who violates the terms or conditions of his or her visa cannot be deemed to have unlawful status unless and until action is taken by the Department of State.[3] Thus, it is clear that so long as the Department of State has not withdrawn recognition of "A" or "G" status, the "A" or "G" visa holder's status cannot be deemed to be illegal.

III. CONCLUSION

Based on the foregoing, I am satisfied that, with respect to "A" and "G" visa holders, the defendants have com-

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[3] Affording special treatment to foreign diplomats, ministers and representatives is neither inappropriate nor unusual. *See, e.g.*, **U.S. Const.** art. III, sec. 2, cl. 2 ("[i]n all cases affecting Ambassadors, other public Ministers and Consulars, . . . the supreme Court shall have original Jurisdiction"); 8 U.S.C. sec. 1103(a) ("[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. . . "). Rather, such treatment reflects the role of international comity in domestic policy as well as the importance of diplomatic relations.

plied with both IRCA and the Orders of this Court. Accordingly, Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders shall be denied.

An appropriate Order accompanies this Opinion.

Date: June 21, 1989

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Richard Thornburgh, *et al.*,

Defendants.

FILED

JUN 29 1989

Clerk, U.S. District Court
District of Columbia

ORDER

On this date, the Court issued an Opinion addressing Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders. Based on the reasoning set forth in that Opinion as well as the entire record in this case, it is

ORDERED that Plaintiffs' Motion to Hold Defendant's In Contempt or, In The Alternative, to Compel Compliance with the Court's Orders shall be and hereby is denied.

Date: June 27, 1989

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*,

Plaintiffs,

v.

Richard Thornburgh, *et al.*,

Defendants.

FILED

JUL 24 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Memorandum Opinion

Pursuant to Federal Rule of Civil Procedure 53 and Supplemental Order XI, this Court has appointed several special masters to conduct inquiries and make recommendations in the above action. *Ayuda v. Meese*, Supplemental Order XI, 700 F.Supp. 49 (D.D.C. 1988). Several of these special masters, in accordance with the procedures set forth in Supplemental Order XI, have petitioned this Court for an interim award of fees. In addition, Special Masters Laurence Storch and Joel F. Brenner ("Petitioners") have filed a joint memorandum in support of their motion for fees.[1]

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[1] Plaintiffs have endorsed the legal position of Special Masters Storch and Brenner.

The defendant, Immigration and Naturalization Service ("INS" or "government"), opposes the award of interim Special Masters' fees arguing that such an award is barred by sovereign immunity. *See* **Defendant's Opposition to Motion for Award of Interim Fees to Special Masters.** Although INS recognizes that 28 U.S.C. Section 2412(a)[2] waives the government's sovereign immunity to permit an award of costs, INS maintains that this explicit waiver cannot be read to encompass special master fees.

This matter has been fully briefed and a hearing was held on June 29, 1989. Based upon that hearing, the briefs filed and the entire record in this case, I am prepared to grant Petitioners' Motion.

DISCUSSION

INS does not and cannot quarrel with the proposition that this Court has the authority under 28 U.S.C. section 2412(a) to assess the costs of litigation against the government. In other words, section 2412(a) indisputably acts as a waiver of the government's sovereign immunity. However, INS argues that "costs" under section 2412(a) should be strictly limited to those items specifically enumerated in 28 U.S.C. Section 1920.[3] Accordingly, INS contends that

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[2] 28 U.S.C. Section 2412(a) states in pertinent part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

[3] Such items include:

> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the

special master fees cannot be assessed against the government.

Petitioners argue that "costs" under 2412(a) should be read to include special master fees. In fact, numerous cases have explicitly and without qualification held that special master fees are "costs" assessable under 2412(a). *See, e.g., NORML v. Mullen*, 828 F.2d 536, 545-46 (9th Cir. 1987); *Trout v. Ball*, 705 F.Supp. 705, 707-08 (D.D.C. 1989); *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 561-64 (N.D. Cal. 1987); *Young v. Pierce*, 640 F.Supp. 1476, 1491-93 (E.D. Tex. 1986), *vacated on other grounds*, 822 F.2d 1368 (5th Cir. 1987); *United States v. A.T. & T.*, 461 F. Supp. 1314, 1348 n. 112 (D.D.C. 1978). During oral argument, INS conceded that it is unable to cite a single case that holds to the contrary.

Two decisions in this district recently have addressed this issue. *See Trout*, 705 F.Supp. at 707-08; *Washington Post v. U.S. Dept. of Defense*, C.A. No. 84-0300 (D.D.C. Dec. 14, 1989) (order appointing special master). Both cases permitted the award of special master fees against the government under 2412(a). In *Trout v. Ball*, Judge Harold Greene ordered the government to pay the fees of a special master and explicitly rejected the very argument currently raised by INS. 705 F.Supp. at 707-08. In *Washington Post v. U.S. Dept. of Defense*, Judge Oberdorfer ordered the

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case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. Section 1920.

appointment of a special master whose fees were to be paid by all parties, including the government.

Although *Washington Post v. U.S. Dept. of Defense* did not specifically address whether section 2412(a) provides for the award of special master fees, the case is particularly meaningful because of its subsequent history. *See In re U.S. Dept. of Defense*, 848 F.2d. 232 (D.C.Cir. 1988) (denying petition for writ of mandamus). After Judge Oberdorfer adopted the special master procedure noted above, the government petitioned the Court of Appeals for a writ of mandamus directing the district court to revoke the appointment of the special master. Ultimately, the Court of Appeals denied the government's motion.[4] What is significant about *Washington Post* and *In re U.S Dept. of Defense* is that the Court of Appeals took no exception to the partial award of special master's fees against the government. Indeed, the Court of Appeals noted—without criticism or question—the fee structure Judge Oberdorfer had adopted. *In re U.S. Dept. of Defense*, 848 F.2d at 234 n. 3. *See generally Trout v. Ball*, 705 F.Supp. at 708 (commenting on *In re U.S. Dept. of Defense*).

In the face of these precedents, INS nevertheless argues that the district court authority under Rule 53 and Section 2412(a) should be constricted. I cannot agree. The law is well-settled, the fees of special masters may be properly charged to the government as "costs" under 28 U.S.C. 2412(a). I find no need to deviate from this ruling in the present case. Indeed, if ever there was a case which proved that, when appropriate, courts must be able to assess special master fees against the government, this is that case.[5]

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[4] Although the government raised the sovereign immunity issue before the District Court, apparently the argument was abandoned before the Court of Appeals.

[5] This Court attempted to avoid a protracted and potentially costly special master proceeding by permitting INS to conduct the necessary inquiry on its own. On several occasions this suggestion was flatly

One further point must be made. The government argues that sovereign immunity stands as an absolute and impenetrable bar to its payment of special master fees. The government has stressed that it can find no waiver of sovereign immunity in section 2412(a). Accordingly, the government asserts that it simply is without the legal power and authority to pay special master fees.

Despite unyielding adherence to this position, at oral argument government counsel admitted that at times the government has acquiesced in the payment of special master fees. Indeed, it has come to the attention of this court that after an adverse determination by Judge Greene in *Trout v. Ball*, the government has now seen fit to forgo appellate review and provide the special master compensation ordered by the Court. Since it is the government's view that such payment cannot occur absent a waiver of sovereign immunity, I can only conclude that the government, in certain cases, has willingly acknowledged that the section 2412(a) waiver applies to special master fees.[6] Unfortunately, the government has been unwilling or unable to explain any basis or criteria for its inconsistent position on this issue. Thus, it is inexplicable to this Court that the government, without explanation, would seek to defeat a position it willingly has abided by in other cases.

Clearly, under the compelling circumstances of this case—where the INS has been unwilling or unable to act on these individuals' legalization applications—the need for the special master proceeding is most compelling. I am certain that this case would meet any appropriate criteria for the payment of special master fees the government might care to articulate.

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rejected. *See Ayuda v. Meese*, Supplemental Order XI, 700 F.Supp. at 50.

[6] Alternatively, it could be argued that the government, when it is convenient, ignores the very principles of sovereign immunity it argues constrain this Court. I am unwilling to reach such a conclusion.

CONCLUSION

Justice and equity require—and Section 2412(a) permits—the award of special master fees against the government. Accordingly, this Court will begin processing Petitions for the Interim Award of Special Masters' Fees.

Date: July 24, 1989

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0625
Judge Stanley Sporkin

Ayuda, Inc., *et al.*

Plaintiffs,

v.

Richard Thornburgh, *et al.*

Defendants.

FILED

JUL 24 1989

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUPPLEMENTAL ORDER XIII

Paragraph 8 of Memorandum Opinion And Supplemental Order XI provides that "[u]nless otherwise ordered by the Court, a Special Master shall be paid at a rate of $65.00 per hour but not to exceed $500.00 per day, plus travel expenses at the standard per diem rate established by the government." In addition, attorneys employed by the Special Masters shall be paid at the rate of $50.00 per hour; paralegals and law clerks employed by the Special Masters shall be paid at the rate of $25.00 per hour, provided that should plaintiffs in their attorney's fees application be awarded more than $25.00 per hour for a paralegal's work, this rate may be reconsidered; and reasonable expenses, such as secretarial assistance, which shall be billed at a rate not to exceed $20.00 per hour, photocopying, postage,

long distance telephone calls, messengers, and computerized research, which shall be billed at cost, shall be paid.

While it is understood that the defendants reserve all rights to object to an award and payment of Special Masters fees and costs, it is understood that defendants agree to account for such fees and costs as stated herein and in the first sentence of Paragraph 8 of Supplemental Order XI.

SO ORDERED, this 24 day of July 1989.

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

APPENDIX I

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 27, 1989 Decided March 3, 1989

No. 88-5360

IN RE: RICHARD THORNBURGH, et al., PETITIONERS.

Petition for Writ of Mandamus
(Civil Action No. 88-00625)

Edward R. Cohen, Attorney, United States Department of Justice, with whom *Barbara L. Herwig*, Attorney, United States Department of Justice, was on the petition for a writ of mandamus, for petitioners.

Lloyd N. Cutler, with whom *Stephen W. Preston* was on the response to the petition for a writ of mandamus, for respondent.

Wayne H. Matelski, *Lynda S. Zengerle*, *Carolyn Waller*, *Deborah Sanders*, and *Michael Rubin*, entered appearances for plaintiffs Ayuda, Inc., et al.

Plaintiffs filed suit in *Ayuda* to challenge an INS regulation issued pursuant to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 ("IRCA"). Among the major features of IRCA was an "amnesty" provision allowing the legalization of resident status for certain aliens who entered the United States (lawfully or unlawfully) before January 1, 1982, and who have resided in the United States in an unlawful status since that date. IRCA established a 12-month period to be designated by the Attorney General, beginning no later than May 5, 1987, in which such aliens could apply for adjustment of their status. 8 U.S.C. § 1255a(a)(1)(A). The Attorney General designated May 5, 1987, as the starting date, and the deadline for applications as May 4, 1988. 8 C.F.R. § 245a.2(a)(1) (1988).

The IRCA provision at issue in *Ayuda* concerns "nonimmigrants," persons who entered the United States lawfully but later violated restrictions on their status. Under IRCA, those nonimmigrants can qualify for amnesty only by establishing either (1) that their authorized stay expired through the passage of time before January 1, 1982, or (2) that their "unlawful status was known to the Government as of [January 1, 1982]." 8 U.S.C. § 1255a(a)(2)(B).

The challenged INS regulation defined "Government" in the foregoing provision to mean "the Immigration and Naturalization Service." 8 C.F.R. § 245a.1(d). In their complaint, plaintiffs sought a declaratory judgment that the regulation was invalid and that a nonimmigrant's unlawful status was "known to the Government" if it was known to any federal department, bureau or agency. Plaintiffs sought to have a plaintiff class certified and requested that the court issue orders (a) requiring petitioners to promulgate corrected regulations and notify members of the plaintiff class; (b) tolling the May 4, 1988, deadline to allow class members a full 12-month period in which to apply under corrected regulations; and (c) granting further relief as appropriate.

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and GREENE,* *District Judge*.

Opinion for the court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: Petitioners, Richard Thornburgh *et al.*,[1] are defendants in an action now pending in the district court, in which four organizations and five "Doe" individual aliens ("plaintiffs"), purporting to represent a class of similarly-situated aliens, challenged a regulation of the Immigration and Naturalization Service ("INS") and sought remedies for alleged injuries to their rights as a consequence of the allegedly invalid reglation. Having ruled that the INS regulation was invalid, the district court entered two orders of referral to one or more special masters, instructing them to compile certain information about aliens adversely affected by the invalid regulation and to recommend what sort of relief, if any, the district court should order for the affected plaintiffs. Petitioners now seek a writ of mandamus directing the district court to withdraw the reference to special masters. It is conceded by the petitioners themselves that such a writ of mandamus may properly issue only if there is no conceivable form of relief that the district court could afford to the affected aliens. Because at this juncture in this case we cannot with confidence rule out the possibility of some valid relief ensuing from the masters' information-gathering and recommending functions, we deny the mandamus petition.

I. BACKGROUND

This proceeding arises out of *Ayuda, Inc. v. Thornburgh*, C.A. No. 88-00625 (D.D.C. filed March 8, 1988).

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* The Honorable Harold H. Greene, of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Petitioners are the Attorney General, the Commissioner of the Immigration and Naturalization Service (INS), and the INS.

On March 30, 1988, United States District Judge Stanley Sporkin ("respondent") entered a declaratory judgment interpreting the statutory term "Government" to mean "the United States Government and not simply the INS" and declaring 8 C.F.R. § 245a.1(d) to be invalid. *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 666 (D.D.C. 1988). At the same time, respondent ordered the INS to "take steps to notify promptly all persons affected by the regulation in question of this court's determination" and to adopt measures to ensure that those aliens would have an opportunity to file timely applications in the 39 days remaining before the May 4 deadline. *Id.*

In the weeks following the March 30 ruling, respondent entered a series of supplemental orders. Orders entered on April 6 and 7 (Supplemental Orders I, II and III) clarified the March 30 ruling and enforced it by, *inter alia*, ordering the INS to reopen the cases of alien applicants who had been turned away as a result of 8 C.F.R. § 245a.1(d). 687 F. Supp. at 666-67. The defendants (petitioners here) did not appeal those orders, nor did they appeal the March 30 ruling itself.

On April 28, plaintiffs moved for an order tolling the statutory deadline and submitted evidence purporting to show that the INS had failed to comply with the district court's prior notification and reprocessing orders. On May 2 and 4, respondent entered three orders (Supplemental Orders IV, V and VI) further implementing the court's ruling. 687 F. Supp. at 667-69. In particular, Supplemental Order V ordered the INS, for the first time, to accept applications from "known to the Government" aliens whose unlawful status as of January 1, 1982, stemmed from their willful violation of the mandatory reporting requirements of § 265 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1305 (repealed Dec. 29, 1981).

On May 4—the last day in the 12-month designated filing period—respondent entered Supplemental Order

VII, which denied "[p]laintiffs' request to toll the May 4, 1988 filing deadline for the class of aliens affected by this Court's prior orders." 687 F. Supp. at 669. At the same time, however, the court retained jurisdiction to provide any relief that might be appropriate, "in individual cases . . . where an alien can demonstrate that he/she failed to exercise his/her right to apply for legalization by May 4, 1988, because he or she was misled directly or indirectly by the action or inaction of the INS or its agents." 687 F. Supp. at 670.

The district court subsequently moved to ascertain the identities of any aliens so misled. On June 9, in Supplemental Order IX, Judge Sporkin prescribed a form on which aliens affected by his ruling could submit sworn statements indicating their reasons for not applying before the deadline. 687 F. Supp. at 671-74. These "Statement of Reasons" forms were to be filed in the district court by plaintiffs' counsel.

Petitioners initiated an appeal to this court on July 5 from certain parts of Supplemental Orders IV, V and VII. The appeal raised, *inter alia*, the question of whether the district court could properly retain jurisdiction to provide further relief to aliens who failed to meet the May 4 deadline. *See* Notice of Appeal, ¶ 3, Respondent's Appendix F; Statement of Issues to be Raised on Appeal, ¶ 7, Respondent's Appendix G. This particular question (among others) was subsequently withdrawn from the appeal by petitioners. Defendants-Appellants Motion for Partial Withdrawal of Appeal, Respondent's Appendix H. The appeal, which now centers on the Supplemental Order V command that the INS accept applications from aliens whose unlawful status stemmed from their willful violation of INA § 265, is still pending. *Ayuda, Inc. v. Thornburgh*, No. 88-5226 (D.C. Cir. filed July 18, 1988).

After a number of completed "Statement of Reasons" forms were filed in the district court, respondent issued

Supplemental Order XI on September 27, stating his intention to appoint one or more special masters and prescribing their functions. The special masters would determine whether each alien "was in fact injured, prejudiced or misled by the Government's impermissive definition of 'known to the Government,'" and would submit to the court their findings in this regard as well as recommendations for any relief that might be legally provided to the alien. Respondent's Appendix D at 4. The court deferred consideration of whether to certify a plaintiff class pending the conclusion of the special masters' inquiry. *See id.* at 8. At the same time, the court "held in abeyance" its Supplemental Order VII, which had refused to toll the statutory deadline. *Id.* On October 28, in Supplemental Order XII, the court appointed a lead special master. Respondent's Appendix E.

Petitioners filed the present petition for mandamus in this court on November 18. The petition seeks a writ of mandamus directing the district court to withdraw those provisions of Supplemental Orders XI and XII that establish and implement a reference to special masters.

II. MANDAMUS STANDARDS

This court's authority to issue a writ of mandamus is derived from the All Writs Act, 28 U.S.C. § 1651(a), which empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Mandamus, we are all aware, is a drastic remedy, "'to be invoked only in extraordinary situations.'" *In re Halkin*, 598 F.2d 176, 198 (D.C. Cir. 1979), quoting *Kerr v. District Court*, 426 U.S. 394, 402 (1976). It is traditionally used only when necessary to prevent an inferior court from operating outside its prescribed jurisdiction. *Halkin*, 598 F.2d at 198. It is not to be used merely to stop a judge mid-trial from making an error that can later be corrected on appeal. Rather, the

writ may issue only "to correct those exceptional circumstances where there has been a 'clear abuse of discretion or usurpation of judicial power.'" *Halkin*, 598 F.2d at 198, quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

A strong congressional policy against piecemeal appeals permeates the federal judicial system. *See Parr v. United States*, 351 U.S. 513, 520-21 (1956). Appeal from a final judgment is the standard means of redressing erroneous rulings by lower courts.[2] Because of the discretionary nature of a mandamus writ, *United States v. Poindexter*, 859 F.2d 216, 222 (D.C. Cir. 1988), a successful petitioner for mandamus normally must demonstrate that "appeal is a clearly inadequate remedy" for the alleged error, *Halkin*, 598 F.2d at 198, quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947), and that she would be irreparably harmed by being forced to await relief under appeal. *Halkin*, 598 F.2d at 198. Additionally, the petitioner must demonstrate that her right to relief is "clear and indisputable," *Kerr v. District Court*, 426 U.S. at 403, and that nothing that might happen later in the proceeding could change the inevitability of her success. Even where the petitioner challenges the district court's basic determination that it has jurisdiction over the case, a court of appeals should be "reluctant to interfere" with the district court's determination so long as it is reviewable in the regular course of appeal. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Ex Parte Harding*, 219 U.S. 363, 378-80 (1911) (mandamus is available to redress district court's erroneous refusal to remand case to state court only where no appeal would ever lie); *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 4-5 (1st Cir. 1984) (even given "fairly obvious" lack of subject-matter jurisdiction,

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[2] Congress has provided for a narrow class of exceptions to the rule. *See, e.g.*, 28 U.S.C. § 1292(a), (b).

mandamus should issue "only in exceptional circumstances").[3]

III. Petitioners' Contentions

Petitioners make several arguments to bring themselves within the narrow confines of mandamus as a remedy designed only for clear-cut violations of a court's basic jurisdiction. *First*, petitioners argue that "[i]t is well-settled" that an improper reference to a special master is a sufficiently fundamental violation of jurisdiction as to be redressable by writ of mandamus. *Second*, they claim that the aspects of *Ayuda* referred to the special masters do not constitute a "case or controversy" within the meaning of Article III of the Constitution, so that the district court has no jurisdiction over them. *Third*, they contend that IRCA permits individual aliens to challenge denial of legalization only in petitions for review of their deportation proceedings, not in the context of an affirmative suit to invalidate a regulation. *Fourth*, they argue that there is no relief that the special masters could possibly recommend as a result of their inquiry that the district court has any power to grant. This last point, we believe, is the crux of petitioners' case, and presents the most difficult issue. We will

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[3] *See also* First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 700 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (having established that district court lacks subject-matter jurisdiction, petitioner "faces the additional hurdle of showing that mandamus is the appropriate remedy"); Bancohio Corp. v. Fox, 516 F.2d 29, 33 (6th Cir. 1975) ("Issuance of the writ is appropriately denied where the question of [subject-matter] jurisdiction is factually and legally difficult."); Belcher v. Grooms, 406 F.2d 14, 16-17 (5th Cir. 1968) (refusing to issue writ because district court did not clearly lack jurisdiction; jurisdictional issue is "to be decided in the pending appeal under normal and ordinary appellate procedures, upon detailed consideration of the record, and application of established standards of judicial review").

accordingly deal first with petitioners' other three contentions.

A. *Erroneous References to Special Masters*

Petitioners rely on *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), for the proposition that mandamus lies to correct an improper reference to special masters. *La Buy*, however, involved conduct by a district judge of a wholly different stripe from that challenged in this case. The district court in *La Buy* referred entire trials of complex cases to a special master for final disposition, causing the Supreme Court to characterize his action as an "abdication of the judicial function," and to roundly condemn the use of a master "to displace the court." 352 U.S. at 256. Such an abdication of the total judicial power unquestionably rose to the level of an extraordinary abuse of discretion by a judge, a "palpably improper" action, and the "practical[] nullifi[cation]" of the judge's duty. *Id.*

The petitioners in this case certainly do not accuse the respondent of any such improper delegations to a master of inherently judicial functions; the masters' task is only to collect information and make recommendations for relief. *See* Supplemental Order XI at 4-8. There is no question but that Judge Sporkin has "retain[ed] decisional authority over the issue in question." *In re U.S. Department of Defense*, 848 F.2d 232, 239 (D.C. Cir. 1988). *See* Petition at 16 (petitioners' argument is a challenge to the powers of the district judge himself).[4] Nothing in *La Buy* suggests that mandamus is any more appropriate, *generally*, to correct errors relating to the appointment of special masters than to correct other

[4] At oral argument, counsel for petitioners confirmed that their objections based on the limits of the district court's jurisdiction apply equally to the district judge himself and to the special masters.

kinds of error. Indeed, absent the *La Buy* problem of "untoward or irretrievable delegation of judicial authority," this court has been reluctant to "interfere[] with [a district judge's] trial management" by issuing a mandamus writ ordering that a special master reference be vacated. *See In re U.S. Department of Defense*, 848 F.2d at 237, 238-39 (refusing to issue writ); *see also* 5A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 53.05[3] (2d ed. 1988). In the final analysis, mandamus lies only if the petitioners are right about their fourth point—that there exists no jurisdiction in the court itself to provide any additional relief to the aliens injured by the invalid regulation.

B. *Case or Controversy*

1. *Mootness*

Petitioners argue that *Ayuda*, at this juncture, does not present a case or controversy; the government no longer contests the invalidity of the regulation and there are no longer any parties before the district court still seeking relief. Petition at 8. Petitioners contend that the four organization plaintiffs have no cognizable interest in the possibility of further relief for individuals, and the five individual "Doe" plaintiffs presumably filed amnesty applications immediately after the district court's March 30 invalidation of the regulation and so met the May 4 deadline. Thus, say petitioners, all claims before the court have been either satisfied or rendered moot. Petition at 8 & n.15. The possibility that other "known to the Government" aliens may exist who did not file by the May 4 deadline because of the government's wrongful action does not create a live case or controversy, since they are not parties to the action. The district court has not yet ruled on the plaintiffs' motion for class certification. Petition at 8.

Even assuming that the claims of the "Doe" plaintiffs are moot,[5] the district court is not necessarily deprived of all jurisdiction over the action. To begin with, the four organization plaintiffs arguably continue to have a justiciable interest in the outcome of the special masters' inquiry.[6] Moreover, plaintiffs have moved to amend their

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[5] Plaintiffs do not deny that the five "Doe" plaintiffs filed individual applications between March 30 and May 4; they say only that the record does not reflect whether they did. Petitioners reply, logically, that whether the "Doe" plaintiffs filed by May 4, rendering their individual claims moot, is knowledge available only to plaintiffs' counsel. In the absence of a denial of such filing by plaintiffs, we can reasonably assume they did.

[6] Petitioners contend that the organization plaintiffs are no longer aggrieved, Petition at 17, and that the claims of the organization plaintiffs "have nothing to do with the reference" to special masters. Reply at 4. In order to establish standing in its own right, an organization must meet the three constitutional components—injury-in-fact, causation and redressability—as well as the prudential rule that the injury must be arguably within the zone of interests protected or regulated by the law on which the complaint is founded. Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 936 (D.C. Cir. 1986). The alleged injury in this case—that the petitioners' actions have denied the plaintiff organizations the information and avenues of redress they wish to use in their routine information-dispensing, counseling, and referral activities—is arguably similar to the injuries found sufficient in *Action Alliance*, 789 F.2d at 937-38, and in Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982). Here, the organizations claim (among other things) that their ability to render accurate advice is hindered by the ambiguous legal status of "known to the Government" aliens whose applications were discouraged by the INS's misreading of the law. *Ayuda*, 687 F. Supp. at 655-56. The causation and redressability tests appear to present no difficulty, because the organizations' injury does not result from the actions of third parties not before the court. *See Action Alliance*, 789 F.2d at 938. As for the prudential zone-of-interests test, the organizations' interests include the "promotion of the knowledge, enjoyment, and protection of the rights created by" IRCA. *Id.* at 939; *see also* Clarke v. Securities Industry Ass'n, 479

complaint to add as named plaintiffs individuals who failed to file by May 4, and they have moved for certification of a class that includes such persons. The district court has indicated that it will rule on both motions after receiving the results of the special master inquiry. *See* Respondent's Appendix D at 8. There is authority to the effect that a court may respond to the pre-certification mooting of a class representative's claims by permitting substitution of a new class representative. *See Samuels v. District of Columbia*, 770 F.2d 184, 193 n.5 (D.C. Cir. 1985) (where plaintiffs allege that defendant "*systematically* [violated the law] . . . on a *classwide* basis," pre-certification mooting of named plaintiffs' claims "does not moot such a class action claim") (emphasis in original); *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) ("Whether or not the challenged regulations raise a live controversy with regard to appellant's individual claim, it is clear that a live controversy exists with regard to class members who are currently being denied prior hearings as a result of the regulations."); *Swan v. Stoneman*, 635 F.2d 97, 102 n.6 (2d Cir. 1980) ("To the extent that appellants' argument is that Swan's death does not moot the class claim if one of the proposed intervenors can be substituted as a named plaintiff, we agree."); *Silva v. Vowell*, 621 F.2d 640, 650 (5th Cir. 1980) ("Once the [named plaintiffs'] challenge became moot and put the named plaintiffs' standing in question, the plaintiffs and the judge should have realized that intervention by another named plaintiff was appropriate"; case remanded to district court to allow "an appropriate named plaintiff [to] intervene."), *cert. denied*, 449 U.S. 1125 (1981); *Rivers v. Califano*, 86 F.R.D. 41, 45-46 (S.D.N.Y. 1980) (permitting intervention of new plain-

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U.S. 388, 399-400 (1987). Thus, although we do not decide finally whether organizational standing exists in this case, we cannot find either that its nonexistence is clear enough to warrant mandamus.

tiffs with live claims, and granting class certification); *see also* H. Newberg, *Newberg on Class Actions* §§ 2.25-2.26 (2d ed. 1985 & Supp. 1988). Such action is especially appropriate where the events causing mootness have only individual rather than classwide impact. H. Newberg, *supra*, § 2.23. Here, while we assume that the named parties were apprised of the March 30 ruling by their lawyers, the same assumption cannot be made as to other members of the putative class. Because plaintiffs' counsel have proposed the intervention of several new plaintiffs with allegedly live claims, we decline to issue mandamus on the premise that the entire case should be dismissed due to the mooting of the named plaintiffs' claims.[7]

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[7] Some courts have gone a step further and have permitted the original named plaintiffs *to represent the class* even after their own claims were mooted prior to certification. *See* Wilkerson v. Bowen, 828 F.2d 117, 121 (3d Cir. 1987); White v. Mathews, 559 F.2d 852, 857-58 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *see also* H. Newberg, *supra*, § 2.27. These cases extend the logic of United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), which permitted a named plaintiff, whose own claim was mooted after the district court denied class certification, to represent the class in appealing the denial of class certification. The *Wilkerson* and *White* cases permitted plaintiffs whose claims were mooted prior to a district court's ruling on class certification to continue serving as class representatives throughout the course of the action. Holding that a plaintiff in such circumstances is not "automatically" disqualified from being class representative, the Third Circuit in *Wilkerson* stated that "the question still must be decided whether, all other factors being considered, the plaintiff can fairly and adequately represent the class and meet the other requirements of Fed. R. Civ. P. 23." 828 F.2d at 121. There is some indication in the caselaw, however, that such treatment is proper only in special circumstances, such as where the alleged law violation is capable of repetition, yet evading review. *See, e.g.*, Valentine v. Secretary of Health & Human Services, 542 F. Supp. 76, 78-79 (N.D. Cal. 1982). At any rate, our determination that *Ayuda* continues to present a case or controversy does not depend on the named

Petitioners argue that the existence of a viable plaintiff with a genuine case or controversy must be determined as of the time the court ordered a reference to special masters. But that, so far as we can tell, is not an absolute requirement: a court has jurisdiction to determine whether it has jurisdiction. *Ilan-Gat Engineers, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 239 (D.C. Cir. 1981) (court has power to compel discovery on jurisdictional issues, to ascertain whether it has subject matter jurisdiction). Thus, it is inaccurate to suggest that the existence of Article III jurisdiction must be absolutely certain as of the moment the disputed reference is made. To be sure, there are limits on the extent of time and effort that may properly be expended to ascertain the existence of a case or controversy. But we emphasize that this is not a case in which plaintiffs' counsel seek to use the power of the courts, through the discovery rules, to go fishing for a named plaintiff to replace ones whose claims were mooted. *Cf. Reed v. Bowen*, 849 F.2d 1307, 1313-14 (10th Cir. 1988) (affirming a refusal to permit additional discovery in such circumstances). Nor is it even a case in which plaintiffs' counsel ask the courts to keep the suit alive for a period of time while they seek intervenors on their own. *See Goodman v. Schlesinger*, 584 F.2d 1325, 1332-33 (4th Cir. 1978) (allowing counsel a "reasonable time" to find new plaintiffs with live claims); *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 15-16 (4th Cir. 1972) (same). Here, plaintiffs' counsel have submitted the names of actual persons seeking representative status who allege they have a continuing personal stake in the case and in whatever further relief may be appropriately awarded. The court in turn apparently is waiting to see if any relief is possible and if there are sufficient aliens eligible for such relief to jus-

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plaintiffs' continued status as class representatives. Substitution of new class representatives may well be the better course. At this juncture, all we decide is that the entire action is not moot.

tify a class action. While one could debate about which should come first, party substitution and class certification, or relief recommendations, we do not believe the sequence followed here constituted an abuse of the court's case or controversy jurisdiction so as to invoke mandamus. Nor is it problematic that the district court originally reserved decision on the standing of the individual plaintiffs.[8] Mandamus would be proper only if the individuals clearly lacked standing; since that is not the case, and since petitioners' standing and mootness arguments can be reasserted on appeal, the district court's postponement of decision on the matter does not justify issuance of the writ now.

2. *Redressability*

Petitioners alternatively assert that even if there are persons in the wings willing to continue the action who missed the May 4 deadline, they have no standing to sue: this is because the district court lacks the power to grant any relief to such persons (our fourth point again) and as a consequence, they cannot meet the "redressability" prong of the constitutional standing test. Petition at 17. Even assuming that the former assertion is correct,[9] the latter assertion does not accurately reflect standing doctrine.

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[8] 687 F. Supp. at 660 n.9. The court also reserved decision on the standing of the four organizations to assert the interests of individual aliens. *Id.* Since the organizations do not enroll aliens as members, the argument for such "associational" standing is a weak one here. *See* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 344-45 (1977) (associational standing held to exist where individuals "possess all of the indicia of membership" in the plaintiff organization); American Legal Foundation v. FCC, 808 F.2d 84, 89-91 (D.C. Cir. 1987) (question is whether organization "is the functional equivalent of a traditional membership organization").

[9] We explore at more length, and finally reject, this proposition, *infra*, Part IV.

Redressability is indeed one of the three elements of standing imposed by the "case or controversy" requirement of Article III of the Constitution. A party seeking redress from a federal court must demonstrate (1) some actual or threatened injury that (2) fairly can be traced to the challenged action and (3) "is likely to be redressed by a favorable decision." *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704 (D.C. Cir. 1988), quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The redressability prong of the test deprives the courts of jurisdiction over cases in which the likelihood that the requested relief would redress the plaintiff's injury is "only speculative." *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

Petitioners contend that, if the court lacks power to grant the requested relief, "there is no substantial likelihood that the federal court could redress the injury complained of." Petition at 17. But the redressability prong of the standing test is not an inquiry into the scope of the court's power to grant relief. It does not ask whether it is likely "that the court's determination would provide the ultimate relief sought." *Id.* Rather, the test *assumes* that a decision on the merits would be favorable and that the requested relief would be granted; it then goes on to ask whether that relief would be likely to redress the party's injury. *See Linda R.S. v. Richard D.*, 410 U.S. at 618 ("if [plaintiff] were granted the requested relief," her injury probably would not be redressed); *Common Cause v. Department of Energy*, 702 F.2d 245, 252 (D.C. Cir. 1983) (requested relief probably would not redress plaintiffs' injury, "assum[ing] . . . that a decree ordering such action would be a proper exercise of judicial power"). *See also Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (redressability test "examines the causal connection between the alleged injury and the judicial relief requested").

In sum, the redressability test asks whether a plaintiff's injury would be likely to be redressed *if the requested relief were granted.* To analyze standing by asking whether the relief would be likely to be granted, as petitioners would have us do, would conflate the redressability test with a motion to dismiss for lack of jurisdiction. We examine below the petitioners' assertion that no relief is available in this case; we decline, however, to conduct that analysis under the rubric of standing doctrine. In the end, even if petitioners were right about their redressability argument, it would still depend on the validity of their predicate—that no relief is possible—and the redressability arguemnt is in that sense duplicative.

C. *Statutory Limits on Judicial Review*

In addition to alleging the lack of a case or controversy, petitioners say the district court has no jurisdiction to provide relief to individual plaintiffs because separate provisions in IRCA govern judicial review of denials of legalization under the amnesty provision.

IRCA provides that "[t]here shall be judicial review of . . . a denial [of legalization] only in the judicial review of an order of deportation." 8 U.S.C. § 1255a(f)(4)(A). Since *Ayuda* does not contest particular orders of deportation, petitioners argue that the plaintiffs' pleas for relief to aliens affected by the invalid regulation cannot be adjudicated as part of this action. Petitioners also assert that, under the statute, judicial review of deportation orders can take place only in U.S. Courts of Appeals after the alien has exhausted her administrative remedies.[10]

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[10] *See* 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(a) (review in courts of appeals); 8 U.S.C. §§ 1255a(f)(4)(A), 1105a(c) (exhaustion of remedies).

Emphasizing that the strict standards of mandamus constrain us to withhold the writ unless the district court's lack of jurisdiction is "clear and indisputable," we reject petitioners' contentions. The IRCA judicial review provisions cited refer to "review of a determination respecting an application for adjustment of status." 8 U.S.C. § 1255a(f)(1). The referral orders do not invoke review of any determination respecting applications for legalization; they involve fact finding and recommendations as to relief required by the invalidation of a regulation promulgated under the IRCA. The gravamen of the complaint insofar as it involves adjustment applications at all is that some aliens were improperly deterred from filing applications as a result of the invalid regulation. The referral is to determine who those aliens are, what their situation is and whether the district court can do anything further to assist them. It does not appear to contemplate any review of "a determination respecting an application for adjustment of status." Ample authority supports the proposition that the district court has federal question jurisdiction to entertain a statutory or constitutional challenge to the manner in which the entire IRCA amnesty program is being operated. 28 U.S.C. § 1331(a) (federal question jurisdiction); 8 U.S.C. § 1329 (jurisdiction over "all causes . . . arising under any of the provisions of this subchapter," which includes 8 U.S.C. § 1255a). *See UAW v. Brock*, 106 S. Ct. 2523, 2530 (1986); *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2138 (1986).[11] While we

[11] *See also* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. 1982) ("Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an individual deportation hearing *to the extent these irregularities may provide a basis for reversing an individual deportation order*, that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief.") (emphasis in original).

in no way foreclose petitioners from reasserting the IRCA argument in a direct appeal, where they will not have to meet the rigorous "clear and indisputable" standard, our reading of the IRCA review provisions as a ground for mandamus leads us to conclude that they do not clearly remove jurisdiction from the district court for all future relief.

IV. The Pangilinan Decision

If a mandamus writ is to be issued in this case, it must be on the ground that a federal court has no authority to do anything further by way of relief for aliens who missed the application deadline because of their ignorance of their eligibility due to the government's misconstruction of and even misinformation about the statutory requirements. Petitioners rely on *INS v. Pangilinan*, 108 S. Ct. 2210 (1988), to support this draconian proposition.[12]

A. *Pangilinan Summarized*

In *Pangilinan*, Filipino nationals sought from the district court a declaration of citizenship under a 1942 statute that established a five-year period, ending December 31, 1946, in which aliens serving honorably in the United States Armed Forces during World War II could apply for naturalization. After the Philippines were liberated from Japanese occupation, in August of 1945, a vice consul in Manila was designated to naturalize such aliens. In October of that year, however, his authority was revoked in response to the Philippine government's concerns that the naturalization program would create a manpower drain. Approximately nine months later, in August of 1946, a new official was designated to per-

[12] The *Pangilinan* case was handed down by the Supreme Court on June 17, 1988, after the district court's invalidation of 8 C.F.R. § 245a.1(d), but before the reference to special masters.

form naturalizations in the Philippines and did so until the December 31, 1946, statutory cutoff date.

Nearly 40 years later, some Filipino veterans filed suit for naturalization under the terms of the long-expired statute. Fourteen of them had been present in the Philippines during the entire 1945-46 period but had taken no affirmative steps to be naturalized before the cutoff date. A fifteenth had made only preliminary efforts to obtain citizenship in the United States after his discharge from the service and before the 1946 cutoff; he did not complete the application in time for the deadline. A sixteenth had made an effort to apply at the American Embassy in the Philippines after his discharge from the service and before the 1946 cutoff; he was told no one at the Embassy could assist him. *Pangilinan*, 108 S. Ct. at 2214.

The Supreme Court dismissed the claims of all sixteen aliens, on the grounds that the federal courts lack power to confer citizenship in violation of a deadline imposed by Congress, regardless of equitable considerations. The 1946 deadline, the Court said, defined a congressionally-established policy decision that could not be overridden by the courts, either "by application of the doctrine of estoppel, [or] by invocation of equitable powers, [or] by any other means." *Id.* at 2216. The Court also rejected the aliens' argument that the temporary revocation of the vice consul's naturalization authority violated their constitutional due process and equal protection rights. *Id.* at 2216-17. Finally, the Court rejected one alien's assertion that he should be deemed to have constructively filed a timely application due to his pre-deadline efforts to file; the statute required applications to be filed while on active duty, and the alien in question had not begun to file until after discharge. *Id.* at 2217.

B. *Applicability of Pangilinan to the Present Case*

Petitioners contend that *Pangilinan* absolutely precludes the grant of any kind of relief to aliens who

missed the May 4, 1988, deadline for legalization applications. Petitioners point out that, as in *Pangilinan*, Congress here established a deadline to be designated by the Attorney General and made timely application a prerequisite to the adjustment of legalization status. 8 U.S.C. § 1255a(a)(1)(A); *cf.* 108 S. Ct. at 2215.[13] They conclude from that similarity of congressional purpose that any conceivable form of relief that might be proposed by the special masters in *Ayuda* would violate *Pangilinan*'s command that courts cannot "invo[ke] equitable remedies" to override a congressionally-established policy on the periods during which special-situation applications for citizenship must be made. 108 S. Ct. at 2215.

But does *Pangilinan* so clearly foreclose all relief in the present case that the district court must be deemed to have engaged in a "clear abuse of discretion or usurpation of judicial power," *In re Halkin*, 598 F.2d 176, 198 (D.C. Cir. 1979), by establishing the special masters process to inquire into the plight of late filing aliens and to make recommendations for any relief legally possible? Our inquiry encompasses two questions. *First*, is there any scenario under which the district court could lawfully order the processing of applications filed after the May 4, 1988 deadline?[14] *Second*, are there any alternative remedies available, that do not involve a tolling or override of the deadline?

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[13] The distinction between legalization of resident alien status under IRCA and naturalization under the 1942 statute is not even suggested as a basis for distinguishing *Pangilinan*.

[14] The district court has reserved decision on whether it will order the processing of applications filed after the deadline. *See* Supplemental Order VII (refusing to toll deadline); Supplemental Order XI, Respondent's Appendix D, at 8 (holding Supplemental Order VII in abeyance); *id.* at 2 (what forms of relief are precluded by *Pangilinan* is "an issue I do not have to determine at this time").

1. *Tolling of the Application Deadline*

The plaintiffs (and respondent Judge Sporkin) advance three bases for distinguishing *Pangilinan*'s seemingly impenetrable bar against any extension of the May 4 deadline.

a. *Existence of Governmental Misconduct*

Their first argument is that the *Ayuda* case involves governmental misconduct of a type not present in the *Pangilinan* case. As the district court has not yet passed on the plaintiffs' factual allegations, we do not decide whether *Pangilinan* could be distinguished if plaintiffs were to show that the INS failed to abide by the court's orders. Considering the state of the record at the present time, we do not rest our decision on this ground.

To begin, we pause to examine the plaintiffs' reading of *Pangilinan*. Plaintiffs argue that, in *Pangilinan*, the government did not violate the 1942 statute when it stripped the vice consul of his naturalization power. Plaintiffs' Brief at 7-9 & n.16. This is incorrect. The Ninth Circuit's decision under review in *Pangilinan* held that the revocation of the vice consul's authority "violated what it characterized as the mandatory language" of the statute. 108 S. Ct. at 2215. Nothing in the Supreme Court's *Pangilinan* opinion even hints that the Court took a contrary view. The Court's reversal of the Ninth Circuit was squarely based on the premise that courts lack the power to grant equitable remedies tolling statutory deadlines for naturalization, not on the premise that there was no governmental wrong to be remedied.[15]

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[15] Plaintiffs imply that the *Pangilinan* Court reversed the Ninth Circuit's determination that the revocation of the vice consul's naturalization power violated the statute. They point to the Court's explanation of its certiorari grant as having been based, "[i]n part," 108 S. Ct. at 2212, on a conflict with a Second Circuit case which held that there was no statutory violation. Plaintiffs' Brief at 8 n.16. They also point out that the government's brief in *Pangilinan* advanced the Second

Counsel for Judge Sporkin argues a related distinction: that, unlike this case, the government engaged in no "affirmative misconduct" in *Pangilinan*. Respondent's Brief at 13-14. Counsel at oral argument gave as an example of "affirmative misconduct" the allegation that the INS continued to refuse "known to the Government" aliens under 8 C.F.R. § 245a.1(d) after the March 30 district court ruling, in violation of the court's orders. As petitioners point out, the district court did not find the INS' misinterpretation of IRCA to have been driven by a malicious motive, any more than the *Pangilinan* court found bad faith in the government's misinterpretation of the 1942 statute. *Compare* 108 S. Ct. at 2217 (lack of evidence that the government's acts "were motivated by any racial animus") *with* Plaintiffs' Appendix 6 at 15 (district court finding that INS "did not act in bad faith"). What remains to be determined is whether the government's actions *after* the March 30 district court ruling were qualitatively more culpable than those in *Pangilinan*. While the plaintiffs claim they will produce additional evidence of governmental misconduct in the relief proceedings,[16] we must reject government culpability as a ground for bypassing *Pangilinan*'s holding at this juncture.

Circuit's view. *Id.* at 8-9 n.16. Our reading of the *Pangilinan* opinion, however, suggests that the Supreme Court either assumed the Ninth Circuit was right about the existence of a law violation or considered the matter irrelevant to its holding.

[16] Plaintiffs presented evidence in April purporting to show that the petitioners failed to abide by the March 30 ruling of the district court. Yet as late as July 22, Judge Sporkin reiterated his finding that "the Government did not act in bad faith." Plaintiffs' Appendix 6 at 15. On the other hand, Judge Sporkin did indicate on September 27 that the need for reference to special masters was based in part on "the government's outright refusal to conduct an inquiry on its own in order to identify those persons who might have been injured by its impermissive interpretation of the statute." Supplemental Order XI, Respondent's Appendix D, at 3.

b. *Reasonable Opportunity to File*

There are, however, two other arguments for distinguishing *Pangilinan*. The first is that *Pangilinan* does not rule out the possibility that the absence of a reasonable opportunity for "known to the Government" aliens to file applications under the IRCA might constitute a due process violation.

The Supreme Court rejected a due process claim made on behalf of the Filipino veterans in *Pangilinan*, but its discussion explicitly left open the viability of such a constitutionally-based claim in different factual circumstances, stating:

> Assuming that these [aliens] can properly invoke the United States Constitution, and granting that they are members of a special class that Congress intended to favor with statutory entitlements to naturalization, they were not deprived of those entitlements without due process. First, it did not violate due process for Congress to impose a reasonable limitations period upon the filing of naturalization petitions. Second, even assuming that a reasonable opportunity to file for naturalization was required, respondents were accorded at least that.

108 S. Ct. at 2216-17 (citation omitted). The court noted that a naturalization officer was available in the Philippines from August through October 1945 and from August 1946 to the end of that year, a total of seven months. Additionally, Filipinos could be and were naturalized in the United States and at various other locations around the world. *Id.* at 2217. The Court stated:

> We do not agree with [the aliens'] contention that in addition to these ample opportunities, [they] were entitled as a matter of due process to individualized notice of any statutory rights and to the continuous presence of a naturalization officer in the Philippines from October 1945 until July 1946.

Id. It is significant for our purposes that the *Pangilinan* Court's rejection of the due process argument hinged on

the premise that none of the 16 plaintiffs could show that his only opportunity to file arose in the Philippines at a time when applications were not being accepted.[17]

In our case, it is not possible to say with any certainty that there were not aliens who were denied a reasonable opportunity to file between March 30 and May 4.[18] In contrast to *Pangilinan*'s windows of opportunity—totaling some seven months and extending over a two-year period—in which naturalization was available in the Philippines (not to mention the availability of naturalization at other sites outside the Philippines), the "known to the Government" aliens in the present case had 39 days, following the district court's invalidation of the INS regulation, in which to initiate and complete their legalization applications. Moreover, one subset of the "known to the Government" aliens—those whose unlawful status stemmed from their willful violation of the mandatory reporting requirements of § 265 of the INA—had just *two days* to complete their applications. *See* Supplemental Order V, 687 F. Supp. at 668-69 (court's

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[17] As for the two *Pangilinan* aliens who had taken some affirmative steps to file, the Court considered their situation (as contrasted with the others') only in its discussion of the "constructive filing" theory, which is discussed, *infra*, pp. 26-28.

[18] At oral argument, petitioners claimed that the INS in November 1987 began taking "known to the Government" applications from aliens whose illegal status was known to any agency or department of the government. Petitioners' counsel stated that this development, which predated the March 30 ruling, was based on a similar ruling of the Northern District of Texas in Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987). Plaintiffs, on the other hand, allege that the INS did not change its policy nationwide in response to the *Farzad* ruling. This is one factual issue that no doubt will be explored by the district court and/or the special masters. The existence of a factual dispute on this score, if anything, emphasizes the inappropriateness of mandamus relief.

May 2 order covering § 265 aliens). It is entirely possible that many remained unaware of the district court's invalidation of the INS regulation upon which their prior ineligibility had been premised. It is also possible that, if the special masters uncover evidence that some "known to the Government" aliens continued to encounter misinformation or rejection in filing applications even after the district court's March 30 ruling, as plaintiffs' counsel has asserted, that could provide a basis for a due process claim.

We do not know if aliens exist who fit these circumstances, but it would certainly be premature for this court to insist that the district court drop all efforts to find out.[19] Reiterating always that this is a petition for mandamus and that accordingly petitioners' showing of the inescapability of *Pangilinan*'s vise must be "clear and indisputable," we find plausible plaintiffs' argument that a basis for a constitutional claim may exist consistent with *Pangilinan* for aliens denied a reasonable opportunity to file their naturalization applications.

c. *Constructive Filing*

We also conclude that *Pangilinan* does not entirely foreclose the concept of constructive filing within the deadline by aliens who sought to comply but were turned away through no fault of their own.

One plaintiff in *Pangilinan* argued that he should be deemed to have filed a timely application because he took some affirmative steps to file prior to the cutoff date. This argument was based on *Matter of Naturalization of*

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[19] We note that a due process challenge would not necessarily require the filing of a new lawsuit. Plaintiffs' original complaint alleges a fifth amendment violation and prays for, *inter alia*, an opportunity to file legalization applications under the IRCA after the May 4, 1988, deadline. Complaint, Respondent's Appendix A, at 23, 25.

68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975), in which the district court divided claimants into three categories and held that alien servicemen who had taken affirmative steps to apply before the deadline (whom the court dubbed "Category I" aliens) should be deemed to have "constructively filed." *Id.* at 939-40, 951. The *Pangilinan* Court, citing *68 Filipino War Veterans*, rejected this one plaintiff's "Category I" assertion not for legal unacceptability but because his facts did not warrant such treatment. The Court observed that the plaintiff had not taken the preliminary steps both (a) before the deadline and (b) while on active military duty, as the statute required. 107 S. Ct. at 2217; *see INS v. Hibi*, 414 U.S. 5, 7 (1973).

By contrast, it is entirely possible that some members of the putative class in this case could show that they took affirmative steps to file before May 4, 1988, thus warranting a finding of constructive filing. If, for example, a "known to the Government" alien went to an INS office and was turned away on the basis of 8 C.F.R. § 245a.1(d), the alien's action might have been "the only affirmative step a prospective petitioner could take under the Service regulations" in force at the time. *68 Filipino War Veterans*, 406 F. Supp. at 940. Consequently, that action might be considered "the constructive equivalent of filing a petition" for amnesty. *Id.* Although the *Pangilinan* Court did not explicitly approve the constructive filing analysis of *68 Filipino War Veterans*, its rejection of such a claim on factual, rather than conceptual, grounds leaves open at least the possibility that it could be successfully argued in appropriate circumstances.

At oral argument, petitioners contended that "constructive filing" is just another name for the estoppel and equitable remedies rejected by the *Pangilinan* Court. The concepts are, however, distinct. *Pangilinan* rejected the use of equitable remedies to assist aliens who acknowl-

edgedly did not attempt to comply with the statue.[20] The constructive filing argument, by contrast, entails a showing that the aliens in question complied with the statute by attempting to file applications in a proper and timely fashion. *See 68 Filipino War Veterans*, 406 F. Supp. at 939-40. Once again, we find that *Pangilinan* did not so securely shut the door on such a claim as to warrant mandamus.

2. *Alternative Forms of Relief*

Finally, even if we assume that the district court cannot toll the statutory deadline for any of these "known to the Government" aliens, other forms of lesser relief may be available. That is precisely what the special masters have been asked to look into—what kinds of relief may be granted dependent on the facts and status of the adversely affected aliens. The district court has suggested temporary stays of deportation or temporary work authorizations. Plainitffs' Appendix 1 at 17-18; Plaintiffs' Appendix 6 at 14-18. We need not decide if such grants by the district court would be authorized or appropriate in any circumstances; indeed, armed with facts on individual cases, the court might merely recommend to INS such ameliorative measures. Or it could decide to request or instruct those same authorities to permit aliens to raise their constructive filing arguments in the course of individual deportation proceedings. The only form of relief specifically disapproved by the *Pan-*

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[20] Of the 16 aliens in *Pangilinan*, 14 took no affirmative steps to file before the deadline. 108 S. Ct. at 2214. Two others engaged in preliminary efforts to file before the deadline, but after they had ceased to be on active duty. *Id.* Their failure to file while on active duty was fatal under the statute. *See id.* at 2217; INS v. Hibi, 414 U.S. 5, 7 (1973) (naturalization under § 702 "could take place only during active service in the Armed Forces"); Nationality Act of 1940, ch. 199, 56 Stat. 182, § 702.

gilinan Court was the lower courts' asserted "power to make someone a citizen of the United States." 108 S. Ct. at 2216.[21] We cannot on that basis say that the district court in this case will not be able to formulate any complete or partial relief for the "known to the Government" aliens without violating the command of *Pangilinan*. The possibility of relief that does not toll the statutory deadline provides yet another reason to abstain from issuing a writ of mandamus.

C. *Irreparable Harm Requirement*

Our discussion of *Pangilinan* demonstrates that petitioners have failed to make a "clear and indisputable" showing that the district court lacks jurisdiction. Although we believe that discussion provides sufficient reason to forbear from issuing mandamus, we note that petitioners also fail to show that appeal is a clearly inadequate remedy and that they would be irreparably harmed by being forced to await the disposition of an appeal. The only harms allegedly caused by the reference to special masters are the expenses and other litigation burdens involved in the "time-consuming" special masters' inquiry. Petition at 20. Yet it is clearly settled that mandamus cannot be used to shortcut the appeal process, "even though hardship may result from delay and unnecessary trial." *Bankers Life & Casualty Co. v. Hol-*

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[21] The *Pangilinan* Court understandably focused only on the constitutional and statutory limitations on the power of courts to confer citizenship. *See* 108 S. Ct. at 2215, citing U.S. Const., art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *id.* at 2216, citing 8 U.S.C. § 1421(d) (a "person may be naturalized . . . in the manner and under the conditions prescribed in this subchapter, and not otherwise"); *id.* (referring to "the power to confer citizenship"); *id.* ("Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to . . . grant citizenship.").

land, 346 U.S. 379, 383 (1953). The impropriety of granting mandamus simply to relieve a litigant of ordinary litigation burdens reinforces our determination that petitioners have not shown that they warrant the writ.[22]

CONCLUSION

Despite the thoughtful arguments petitioners have proffered to support the view that the district court's reference to special masters of the task of exploring relief for aliens adversely affected by the government's erroneous interpretation of its eligibility requirements constitutes a clear abuse of discretion and a usurpation of judicial power, we find it does not. *Ayuda* in its present posture does not clearly fail to present a case or controversy, and the district court's continued exercise of jurisdiction does not violate the judicial review provisions of the IRCA. We reject petitioners' contention that *Pangilinan* absolutely precludes any and all possible relief that the district court might fashion after receiving the special masters' report. If and when the court orders relief, petitioners will have every opportunity to reassert arguments about its unauthorized or inappropriate nature through the traditional channel of appeal. We do not find the "clear and indisputable" lack of jurisdiction in the district court to explore further relief for late-filing aliens, that is necessary to warrant a writ of mandamus. In our view, there is still room for reasonable argument on the scope and limits of the *Pangilinan* decision. In sum, we decline to issue the writ.

So ordered.

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[22] Indeed, as it turns out, two individuals have accepted special master appointments with the understanding that they will serve without pay if it is determined that the district court cannot lawfully assess the special master costs against the Government. *See* Plaintiffs' Appendix 3.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5226

September Term, 1988

Ayuda, Inc., et al.
v.

Richard Thornburgh, individually and as
Attorney General of the United States, et al.,
Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 18 1989

CONSTANCE L. DUPRÉ
CLERK

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

Constance L. Dupré
Clerk

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5226

September Term, 1989
CA 88-00625

Ayuda, Inc., et al.
v.

Richard Thornburgh, individually and as Attorney General of the United States, et al.,
Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 4 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Silberman and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' Petition for Rehearing, filed September 1, 1989, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5226

September Term, 1989
CA 88-00625

Ayuda, Inc., et al.
v.

Richard Thornburgh, individually and as
Attorney General of the United States, et. al.,
Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 4 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald and Circuit Judges Mikva, Edwards and Ruth B. Ginsburg would grant the suggestion for rehearing *en banc*.

A statement of Circuit Judge Silberman jointed by Circuit Judge D. H. Ginsburg concurring in the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Buckley concurring in the denial of rehearing *en banc* is attached.

A statement of Chief Judge Wald joined by Circuit Judges Mikva and Edwards dissenting from the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Ruth B. Ginsburg dissenting from the denial of rehearing *en banc* is also attached.

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

SILBERMAN, *Circuit Judge*, joined by **D.H. GINSBURG**, *Circuit Judge*, concurring in the denial of rehearing *en banc*: Petitioners and Chief Judge Wald argued, *inter alia*, that IRCA should be construed to permit the district court to have jurisdiction over petitioners' challenge to the INS regulation because otherwise illegal aliens would have to identify themselves and risk deportation in order to challenge the regulation. Although, as the majority opinion indicates, I do not think that consideration can supply jurisdiction to the district court because Congress limited judicial review of legalization determinations—made either by regulation or adjudication—to the

courts of appeal, it is worth nothing that the premise of that argument is flawed.

Paradoxically, petitioners themselves, in their application for rehearing, point to a provision of IRCA not previously brought to the court's attention that undermines their position. Section 1255a(c)(5) provides that "[n]either the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may . . . use the information furnished pursuant to an application filed under this section for *any* purpose other than to make a determination on the application. . . ." (emphasis added)

In other words, the INS may not use information received on an alien's application for legalization to deport the alien. To do so would subject an officer of the INS (or the Justice Department) to a criminal penalty. Therefore, an alien had no legitimate reason to fear that an application for legalization would prejudice his status as an undisclosed illegal alien. To be sure, an alien can not challenge a denial of legalization in court unless and until he faces deportation, and so he could not challenge the legality of the INS regulation until deportation proceedings, but he has no need to since he is not prejudiced by the application. Of course an alien denied legalization by reason of the INS's interpretation of "known to the government" would like to see that determination challenged, but surely some alien in a similar position will face deportation proceedings presently and judicial review in a court of appeal of the INS regulation will presumably be forthcoming.

Although Chief Judge Wald describes this case as impacting tens of thousands, we actually do not know whether *any* aliens declined to file applications for legalization because of uncertainty concerning the INS's interpretation of "known to the government." In light of Judge Sporkin's March 30, 1988 injunction, issued a little over a month

before the expiration of the one-year window period, it seems rather doubtful that anyone remains in that category. If, prior to Judge Sporkin's decision, there were some aliens who did not file applications specifically because of this disputed legal issue they would certainly have filed after the district court opinions were issued. Otherwise, they would not be entitled to legalization, because under § 1255a(1)(A) the alien can only apply within the one-year period.

Petitioners make one other point worth responding to. It is suggested that the panel's interpretation of section 1255a(f), taken to its logical conclusion, would mean that if the INS closed its doors until after the one year application period expired no "judicial review of that patently illegal action" would lie "because no one would have been permitted to file an application." Not so. Petitioners' argument confuses consideration of alien's legalization applications, for which the statute prescribes limited judicial review, with an agency's action which would not be, in any sense, "a determination respecting an application." 8 U.S.C. § 1255a(f)(1). An alien's challenge to the INS in the petitioners' hypothetical would stand on an entirely different statutory footing, because the challenged agency action would not implicate the merits of one or more applications. The appropriate remedy in that event would be mandamus. *See* 28 U.S.C. § 1361. Mandamus is not a substitute for an appeal but a special remedy for agency usurpation of power or a refusal to exercise the authority it was commanded to exercise. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

BUCKLEY, *Circuit Judge, concurring in the denial of rehearing en banc*: I am inclined to agree with the dissent's analysis of the jurisdictional issue. As I conclude the ma-

jority has the better part of the remaining arguments, however, I believe the only likely result of our rehearing the case would be to raise false hopes among the appellees while denying them the opportunity for prompt review by the Supreme Court.

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

WALD, *Chief Judge*, joined by MIKVA and EDWARDS, *Circuit Judges*, dissenting from denial of rehearing *en banc*: The majority's ruling has vast and ominous consequences for tens of thousands of illegal aliens in this country on whose behalf Congress passed the Immigration Reform and Control Act ("IRCA" or "the Act"). Its holding that the district court had no jurisdiction to entertain a suit challenging legalization eligibility regulations for undocumented aliens effectively shuts the door to citizenship for those tens of thousands of illegal residents who are now told—too late to do them any good—that they could only make such challenges through risking deportation. Such result, as this district court and a half dozen other district and circuit courts around the nation have found, runs directly contrary to the thrust of IRCA, which purposely set up neutral community-based intermediaries (QDEs) to generally facilitate legalization for the maximum numbers eligible under the Act and particularly to dispense advice and legal help on a confidential basis to "undocumented aliens who fear coming foreward," H.R. Rep. No. 682 at 73, despite official assurances that they will not be deported. By denying the right of the QDEs to challenge eligibility regulations as invalid, the majority holding makes their statutory role an impossible one.

The majority arrives at its conclusion that IRCA bars a challenge to eligibility rules, apart from individualized legalization applications, entirely by inference. Its only statutory hook is one section, 8 U.S.C. § 1255a(f)(1), which prescribes procedural rules for judicial review of "a de-

termination respecting *an* application" (emphasis added) for legalization. Nowhere in the Act is there any hint Congress meant to preclude garden variety federal question district court jurisdiction over challenges to an agency's rules, on the ground that they conflict with the authorizing Act.

In fact, the INS eligibility regulations centering about the "known to the government" requirement were found to be illegal and unauthorized by statute, and until one month before the final statutory deadline for legalization applications, had prevented thousands of aliens from seeking legalization. (How many of those eligibles managed to file applications for legalization in the one remaining month before the final deadline is far from "certain.") The government never appealed the ruling of the district court invalidating those regulations. Now, however, in a separate appeal involving a subset of the aliens covered by that ruling, this court declares that the district court had no jurisdiction in the first place to decide challenges to any regulations outside of the context of individual deportation proceedings. The ruling runs counter to the clear intent of Congress, and to judicial holdings in other circuits; it needlessly deprives countless beneficiaries of the Act of their statutory right to apply for legalization. It deserves *en banc* consideration by this court.

Ayuda, Inc., et al. v. Richard Thornburgh, et al.,
No. 88-5226

GINSBURG, RUTH B., *Circuit Judge, dissenting from the denial of rehearing en banc*: Because I agree that the court's opinion sets this circuit at odds with the congressional design and the opinions of sister circuits, I am persuaded that this case warrants further airing. I note, however, the court's recognition that the government has acquiesced in prior rulings of the district court. *See Ayuda, Inc. v. Thornburgh*, slip op. at 6, No. 88-5226 (D.C. Cir. July 18, 1989). Correspondingly, the court has precisely

limited its judgment to the vacation of Supplemental Order V. *See id.* at 43

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5226

September Term, 1989
CA 88-00625

Ayuda, Inc., et al.
v.

Richard Thornburgh, individually and as Attorney General of the United States, et al.,
Appellants

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 21 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Wald, Chief Judge; Silberman and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellees' Motion to Stay Mandate and of the response thereto it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX M

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

88-5226

Ayuda, Inc., *et al.*

v.

Richard Thornburgh individually and as Attorney General of the United States, *et al.*

Appellants

APPEAL FROM THE DISTRICT COURT

Number of Case/Order Below: CA 88-00625
Case Type CV.US.
JS-34 Yes
Judge Below: Sporkin (9062)
Date of Judg./Order: 05-02&04-88 [EOD 5/03&05/88]
USDC Offense/Nature of Suit Code: 2440
Date Docketed: 07-18-88
Date Filed in Dist. Court: 03-08-88
Notice of Appeal Filed: 07-05-88

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DATE	FILINGS – PROCEEDINGS
(A)07-18-88	Copy of notice of appeal and docket intries from Clerk, Dist. Ct. (n-7)
(A)07-18-88	Docketing statement was mailed to counsel for appellant
(A)07-18-88	Order 86-6. Initial submissions and procedural motions due 08-17-88: dispositive motions due 09-01-88
(R)08-17-88	2-Appellant's docketing statement and initial submissions (m-17) [15]
(R)08-17-88	4-Appellant's motion to enlarge the period for filing procedural motions affecting calendaring (m-16) [15]

DATE	FILINGS – PROCEEDINGS
(R)08-17-88	2-Appellee's 11(a)(1) certificate (m-17) [15]
(R)08-17-88	4-Appellants' motion to enlarge the period for filing procedural motions affecting calendaring (m-16) [15]
(A)09-01-88	Clerk's order granting motion to extend time up to and including September 17, 1988 per cg
(J)09-19-88	5-Appellants' second motion to extend time for filing procedural motions (m-19) (15)
(J)10-11-88	Clerk's order granting appellant's second motion to extend time and that all initial submissions and procedural motions due on or before October 17, 1988.
(A)11-07-88	Clerk's order that this case has been scheduled for oral argument on Tuesday, March 7, 1989 at 9:30 a.m. before Chief Judge Wald, Circuit Judges Starr and D.H. Ginsburg. The following schedule shall apply: Appellant(s) Brief and Appendix - Dec. 21, 1988; Appellee(s) Brief - Jan. 20, 1989; Appellant(s) Reply - Feb. 3, 1989. Parties are strongly encouraged to hand deliver their briefs to the clerk's office on the due date; filing by mail must be the most expeditious form of delivery. A further order of the Court will be issued regarding the allocation of time for oral argument.
(Z)12-1-88	5-Appellants motion for partial withdrawal of appeal. (M-1) (8)
(A)12-07-88	5-Appellants' supplement to motion for partial withdrawal of appeal (m-6) [23]

DATE	FILINGS – PROCEEDINGS
(L)12-16-88	Per Curiam order granting appellants' motion for partial withdrawal of appeal. CJ Wald, Starr and D.H. Ginsburg, CJ's.
(Z)12-21-88	15-Appellants' Brief. (M-21)
(Z)12-22-89	7-Appendix. (M-22)
(Z)1-23-89	15-Appellees' Brief. (P-23) 15-Addendum to Brief.
(Z)1-23-89	7-Appendix.
(Z)2-7-89	7-CORRECTED appendix. (M-3) (6-25)
(Z)2-7-89	15-Appellants' Reply Brief. (M-3) (6-25)
(Z)2-7-89	15-Appellants' supplemental appendix. (M-3) (6-25)
02-13-89	5-Appellees' Rule 28(j) letter advising of an opinion in related case (m-10) [8]
(Z)2-13-89	15-Errata sheets for appellant's reply brief. (M-10) (6-25)
(Z)2-16-89	5-Plaintiffs-Appellee's motion ro reassign panel. (M-16) (8)
(A)02-23-89	Per Curiam order denying plaintiff-appellee's motion to reassign panel. Wald Chief Judge, Silberman and D.H. Ginsburg, CJs.
(A)2-23-89	5-Defendant-appellants' opposition to plaintiffs-appellees' motion to reassign panel (mp-23) [8]
(A)02-27-89	Clerk's order, *sua sponte*, that the following times are allotted for the oral argument of this case: Appellant - 15 minutes, Appellee 15 minutes. Only one counsel per side will be allowed to argue. The panel considering this case will consist of Chief Judge Wald, Circuit Judges Silberman and D.H. Ginsburg.

DATE	FILINGS – PROCEEDINGS
(A)03-03-89	5-Appellant's errata to a citation (m-3) [25]
(L)03-07-89	ARGUED before Chief Judge Wald, Circuit Judges Silberman and D.H. Ginsburg. IN-ACTIVE BIN No.]
(A)03-20-89	15-Letter from counsel for appellees advising of an additional authority pursuant to FRAP 28(j) (m-20) [25]
(E)07-18-89	Opinion for the Court filed by Circuit Judge Silberman.
(E)07-18-89	Dissenting opinion filed by Chief Judge Wald.
(E)07-18-89	Judgment by this Court that order of the district court appealed from in this matter is vacated, in accordance with the Opinion for the Court filed herein this date.
(E)07-18-89	Mandate order.
(M)07-28-89	5-Appellants' bill of costs (m-26) [9]
(V)09-01-89	15-Appellees' petition for rehearing and suggestion for rehearing en banc - (p-01) [1]
(J)10-04-89	Per Curiam order denying appellees' petition for rehearing. CJ Wald, Silberman and D.H. Ginsburg, CJs.

DATE	FILINGS – PROCEEDINGS
(J)10-04-89	Per Curiam order en banc denying appellees' suggestion for rehearing en banc. (A statement of Cj Silberman joined by the Cj D.H. Ginsburg Concurring in the denial of rehearing en banc is attached; A statement of Cj Buckley concurring in the denial of rehearing en banc is attached; A statement of CJ Wald joined by Cj Mikva and Edwards dissenting from the denial of rehearing en banc is attached; A statement of Cj Ruth B. Ginsburg dissenting from the denial of rehearing en banc is also attached. CJ Wald, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, CJs.
(V)10-11-89	5-Appellees' motion to stay mandate - (p-11) [1]
(V)10-12-89	5-Appellants' response to appellees' motion to stay mandate - (m-12) [1]
(V)11-21-89	Per curiam order that the motion of Thornburg, et al. to stay is denied to the extent that it relates to the Special Masters' proceedings until further order of this Court and that case no. 89-5301 8s hereby held in abeyance until further order of the Court.

APPENDIX N

Statutes and Regulations

Section 106 of the Immigration and Nationality Act, codified at 8 U.S.C. §1105a (1988):

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 6 months after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 60 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of

the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise:

(6) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(7) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(8) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

Section 245A(a)(2) of the Immigration and Nationality Act, codified at 8 U.S.C. §1255a(a)(2) (1988):

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

Section 245A(f) of the Immigration and Nationality Act, codified at 8 U.S.C. §1255a(f) (1988):

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

Section 279 of the Immigration and Nationality Act, codified at 8 U.S.C. §1329 (1988):

§ 1329. Jurisdiction of district courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

28 U.S.C. §1331 (1988):

The district courts shall have original jurisdiction of all actions under the Constitution, laws, or treaties of the United States.

Former Section 265 of the Immigration and Nationality Act, codified at 8 U.S.C. §1305 (1976):

§ 1305. Change of address

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. Any such alien shall likewise notify the Attorney General in writing of each change of address and new address within ten days from the date of such change. Any such alien who is temporarily absent from the United States on the first day of January following the effective date of this chapter, or on the first day of January of any succeeding year shall furnish his current address and other information as required by this section within ten days after his return. Any such alien in the United States in a lawful temporary residence status shall in like manner also notify the Attorney General in writing of his address at the expiration of each three-month period during which he remains in the United States regardless of whether there has been any change of address. In the case of an alien for whom a parent or legal guardian is required to apply for registration, the notice required by this section shall be given by such parent or legal guardian.

8 C.F.R. §245a.1 (1987) provides:

As used in this chapter:

* * *

(d) In the term "alien's unlawful status was known to the government," the term "government" means the Immigration and Naturalization Service. An alien's unlawful status was "known to the government" only if:

(1) The Service received factual information constituting a violation of the alien's nonimmigrant status from any agency, bureau or department, or subdivision thereof, of the Federal government, and such information was stored or otherwise recorded in the official Service alien file, whether or not the Service took follow-up action on the information received. In order to meet the standard of "information constituting a violation of the alien's nonimmigrant status," the alien must have made a clear statement or declaration to the other federal agency, bureau or department that he or she was in violation of nonimmigrant status; or

(2) An affirmative determination was made by the Service prior to January 1, 1982 that the alien was subject to deportation proceedings. Evidence that may be presented by an alien to support an assertion that such a determination was made may include, but is not limited to, official Service documents issued prior to January 1, 1982, i.e., Forms I-94, Arrival-Departure Records granting a period of time in which to depart the United States without imposition of proceedings; Forms I-210, Voluntary Departure Notice letter; and Forms I-221, Order to Show Cause and Notice of Hearing. Evidence from Service records that may be used to support a finding that such a determination was made may include, but is not limited to, record copies of the aforementioned forms and other documents contained in alien files, i.e., Forms I-213, Record of Deportable Alien;

Unexecuted Forms I-205, Warrant of Deportation; Forms I-265, Application for Order to Show Cause and Processing Sheet; Forms I-541, Order of Denial of Application for Extension of Stay granting a period of time in which to depart the United States without imposition of proceedings, or any other Service record reflecting that the alien's nonimmigrant status was considered by the Service to have terminated or the alien was otherwise determined to be subject to deportation proceedings prior to January 1, 1982, whether or not deportation proceedings were instituted; or

(3) A copy of a response by the Service to any other agency which advised that agency that a particular alien had no legal status in the United States or for whom no record could be found.

(4) The applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the Service a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the Service the aforementioned report and that the school no longer has available copies of the actual documentation sent. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

8 C.F.R. §245a.2 (1987) provides:

* * *

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

* * *

(3) An alien who establishes that he or she entered the United States as a nonimmigrant prior to January 1, 1982, and whose unlawful status was known to the Government as of January 1, 1982, and who has thereafter resided continuously in the United States in an unlawful status, and who has been physically present in the United States from November 6, 1986, until the date of filing the application.

* * *

Supreme Court, U.S.
FILED
FEB 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1018

In the Supreme Court of the United States

OCTOBER TERM, 1989

AYUDA, INC., ET AL., PETITIONERS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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29 pp

QUESTIONS PRESENTED

1. Whether the Immigration Reform and Control Act of 1986 precludes a district court from exercising general federal question jurisdiction over a challenge to the validity of an Immigration and Naturalization Service (INS) regulation governing eligibility for legalization.

2. Whether, if the district court had jurisdiction in this case, the court erred in reviewing an asserted INS policy because the agency action in question was neither final nor ripe for judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1018

AYUDA, INC., ET AL., PETITIONERS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 880 F.2d 1325. An opinion and supplemental orders of the district court (Pet. App. 88a-150a) are reported at 687 F. Supp. 650 and 700 F. Supp. 49. Additional opinions and supplemental orders of the district court (Pet. App. 151a-164a) are unreported. The opinion of the court of appeals denying a petition for mandamus (Pet. App. 166a-195a) is reported at 869 F.2d 1503.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1989. A petition for rehearing was denied on October 4, 1989 (Pet. App. 197a). The petition for a writ of certiorari was filed on December 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, "represent[ed] the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 132, 99th Cong., 1st Sess. 18 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 51-55 (1986) (describing history of legislation). As an integral part of that effort, Congress established two major legalization programs that permitted certain undocumented aliens in the United States to obtain lawful resident status. The first legalization program applied to aliens who had resided continuously and unlawfully in the United States since January 1, 1982. 8 U.S.C. 1255a. The second program applied to "Special Agricultural Workers"—aliens who had performed at least 90 days of qualifying agricultural work in the United States during the 12 months ending May 1, 1986. 8 U.S.C. 1160(a).

Under the general legalization program, an alien had to submit an application during a 12-month period that was designated by the Attorney General to begin on May 5, 1987, and to end on May 4, 1988. 8 U.S.C. 1255a(a)(1)(A); 8 C.F.R. 245a.2(a). To qualify for legalization, the alien had to establish his continual unlawful residence in the United States since January 1, 1982, his continual physical presence in the United States since November 6, 1986, and his admissibility as an immigrant, and had to satisfy several other requirements. 8 U.S.C. 1255a(a)(2)(A), (3), and (4). Special rules applied to an alien who had originally entered the United States as a nonimmigrant (generally, one who entered under a visa not entitling him to permanent residency, see 8 U.S.C. 1101(a)(15)). A nonimmigrant had two ways to establish his unlawful status since January 1, 1982. First, a nonimmigrant could show that his visa had expired through the passage of time before January 1, 1982. 8 U.S.C. 1255a(a)(2)(B). Alternatively, a nonimmigrant could show that he had violated the conditions for lawful status

before January 1, 1982, and that this violation was "known to the Government." 8 U.S.C. 1255a(a)(2)(B).

b. In early 1987, the Immigration and Naturalization Service (INS) made available a working draft of regulations to implement the legalization program. See 52 Fed. Reg. 2,115. The draft included a proposed definition of the statutory phrase "known to the Government" for purposes of 8 U.S.C. 1255a(a)(2)(B). After receiving comments, INS published an expanded proposed definition in March 1987, 52 Fed. Reg. 8,753-8,754, and adopted a still more generous definition in its final rules, issued immediately prior to the opening of the application period in May 1987. 52 Fed. Reg. 16,206, 16,208.[1]

The INS rule provided that in the phrase "alien's unlawful status was known to the Government," the word "government" meant "the Immigration and Naturalization Service." 8 C.F.R. 245a.1(d). Thus, a nonimmigrant seeking to qualify for legalization by establishing that his unlawful status was "known to the Government" as of January 1, 1982, had to show that his unlawful status was "known to the INS." Detailed subparagraphs of the rule spelled out the application of the statute to such nonimmigrants. Responding to comments that the term "Government" should be interpreted more expansively to include other federal or state agencies, the INS explained its rejection of that approach.

> Pursuant to section 103 of the [Immigration and Nationality Act], only the Attorney General is charged with the administration and enforcement of the immigration laws. Correspondingly, only the Attorney General can make a determination that an alien's status is "unlawful." To interpret the word "Government" to include Federal, State, and local agencies would make the administration of [the legalization program] difficult, if not impossible, and would vest government agencies with an authority

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[1] After the application period began, the INS twice modified the rule in order further to enlarge its coverage. See 52 Fed. Reg. 43,843, 43,845 (1987) (relating to nonimmigrants on student visas whose schools reported the alien's violation of status); 53 Fed. Reg. 23,382-23,383 (1988) (expanding the same provision).

that Congress specifically granted only to the Attorney General.

52 Fed. Reg. 16,206 (1987).

c. Prior to the issuance of the final rule, a district court considered the "known to the Government" provision in hearing an alien's action to enjoin her deportation pending disposition of a legalization claim. Although noting some reservations, the district court found INS's position—that "known to the Government" meant "known to the United States Attorney General or the INS"—to be the "more persuasive" view. *Kalaw* v. *Ferro*, 651 F. Supp. 1163, 1170 (W.D.N.Y. 1987). After issuance of the final regulations, another district court hearing a motion for habeas corpus disagreed with the INS's definition and found it inconsistent with IRCA. *Farzad* v. *Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987). In response to the *Farzad* decision, the INS announced that it would accept "known to the Government" applications even though they did not meet INS's definition and would grant such applicants temporary work authorization; the Legalization Offices, however, were instructed to recommend such applications for denial.

2. a. Petitioners are several organizations whose principal function is to perform immigration counseling, and five individual nonimmigrant aliens claiming to represent a class of legalization applicants in the INS Eastern and Southern Regions. On March 8, 1988, petitioners brought suit against respondents in the United States District Court for the District of Columbia challenging the INS's regulations under IRCA governing the eligibility of nonimmigrants for legalization. In particular, petitioners claimed that INS's rule defining the phrase "known to the Government" was overly restrictive and was invalid as contrary to the statute. Petitioners requested declaratory and injunctive relief against enforcement of the rule. Pet. App. 89a-90a.

After a hearing, the court ruled in petitioners' favor. The court rejected INS's contention that the organizational plaintiffs lacked standing and were barred by the

exhaustion-of-remedies doctrine from maintaining this action. The court found that the organizations' function of assisting aliens to apply for legalization was impaired by the confusion over the proper interpretation of the phrase "known to the Government," and that this impairment gave them standing to sue. Pet. App. 97a-109a.[2] The court also found exhaustion principles inapplicable because the organizations had "no administrative process to which to appeal." *Id.* at 109a. The court did not address the question whether the individual plaintiffs had standing, or whether the organizations had third-party standing to assert their members' rights. *Id.* at 109a n.9.[3]

On the merits, the court rejected the INS's "known to the Government" regulation, finding it contrary to the plain meaning of the statute. Pet. App. 111a-118a. The court issued a declaratory judgment interpreting the term "Government" in 8 U.S.C. 1255a(a)(2)(B) "to mean United States Government and not simply the INS." Pet. App. 122a. The court also granted a preliminary injunction enjoining INS from applying its regulation and requiring it to give prompt notice of the court's holding to "all persons affected by the regulation in question." *Ibid.* The court believed that such relief was needed because the application period was drawing to a close and qualified applicants had been deterred from

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[2] The court focused on the fact that at least some of the organizational plaintiffs were "qualified designated entities" under IRCA. Pet. App. 107a-109a. Such entities were created by IRCA in order to permit aliens to file legalization applications with nongovernmental intermediaries who would forward the applications to the Attorney General. 8 U.S.C. 1255a(c)(1) and 1255a(c)(2); H.R. Rep. No. 682, *supra*, Pt. 1, at 73 (explaining that such entities were designed to encourage undocumented aliens to apply for legalization without fear of exposure to the INS). The court found that IRCA's provision for "qualified designated entities" placed the organizational plaintiffs within the "zone of interests" protected by the statute. Pet. App. 107a.

[3] Although the individual petitioners moved for class certification, the district court did not act on the motion, and no class has been certified. See Pet. ii.

applying for legalization. *Id.* at 120a-121a. The court retained jurisdiction to assure compliance with its decree and to grant further relief as required. *Id.* at 122a.

b. In a series of supplemental orders, the district court addressed other issues that arose relating to the "known to the Government" provision. Pet. App. 123a-150a, 164a-165a. In its first Supplemental Order, the court sought to clarify its prior ruling by stating that an alien seeking to qualify under the "known to the Government" provision had to show that prior to January 1, 1982, "documentation existed in one or more government agencies," which, taken as a whole, established the alien's unlawful status. *Id.* at 123a. Supplemental Order II required INS to reopen the applications of aliens who had been denied legalization based on the "known to the Government" regulation, to reconsider such applications under the standard announced in the court's prior orders, and to extend the work authorization of such applicants until a final decision was reached. *Id.* at 123a-124a. Supplemental Order III granted petitioners' motion for summary judgment, made the preliminary injunction permanent, and ordered INS to waive filing fees for applicants claiming to qualify for legalization under the "known to the Government" standard. *Id.* at 124a-125a. Supplemental Order IV required INS to process legalization applications filed from abroad by certain aliens; directed INS to continue its efforts to publicize the court's order; ordered INS to grant parole to certain aliens who had left the United States as a result of the prior "known to the Government" rule; and retained jurisdiction. *Id.* at 125a-126a. The Solicitor General determined not to authorize an appeal from the court's original order construing the "known to the Government" provision or from Supplemental Orders I-IV.

c. On April 21, 1988, 11 new organizations filed a motion to intervene as plaintiffs, in order to raise a new issue regarding the interaction of former Section 265 of the Immigration and Nationality Act, 8 U.S.C. 1305

(1976), and the "known to the Government" standard.[4] Section 265 required a nonimmigrant alien to file quarterly and annual address reports with INS. 8 U.S.C. 1305 (1976). Failure to do so rendered the alien deportable unless the omission was "reasonably excusable or was not willful." 8 U.S.C. 1306(b) (1982). The intervenors contended that a failure to make a required report under Section 265 provided a basis, not recognized by INS, for establishing that a nonimmigrant's unlawful status was "known to the Government." Pet. App. 6a-7a.

After the intervenors' argument was adopted by petitioners, Pet. App. 128a-129a, the court issued Supplemental Order V addressing the Section 265 claim. Accepting petitioners' arguments, the court enjoined INS from denying legalization to aliens "who contend that they violated their nonimmigrant status * * * by failing to comply with the mandatory quarterly or annual registration requirements" of former Section 265, "if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization." Pet. App. 127a. The court also ordered INS to supply relevant records, including microfilmed files, to aliens claiming eligibility under the Section 265 "known to the Government" theory. Finally, the court waived the filing fees for such applicants "until such time as this Order becomes a final binding decision or the Defendants have acquiesced in this Court's rulings." Pet. App. 127a.

3. The government appealed from Supplemental Order V, contending that the district court lacked subject matter jurisdiction and, alternatively, that INS had not formulated a policy as to Section 265 aliens that was

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[4] The proposed intervenors were immigration counseling organizations that had filed a parallel class action challenging the "known to the Government" regulation in the Western and Northern Regions of the INS. *Immigration Assistance Project* v. *INS*, 709 F. Supp. 998, later opinion, 717 F. Supp. 1444 (W.D. Wash. 1989), appeal pending, Nos. 89-35345, 89-35593 (9th Cir.).

ripe for judicial review.[5] Agreeing with both of the government's points, a divided panel of the court of appeals vacated the order. Pet. App. 1a-43a.

The court first held that the district court lacked jurisdiction to review INS's legalization regulations. Petitioners claimed that because they challenged only a general rule or policy that would be applied in subsequent cases, the district court had jurisdiction under 28 U.S.C. 1331. They contended that 8 U.S.C. 1255a(f), IRCA's judicial review provision, was not applicable to such a claim. The court of appeals rejected that argument, relying on IRCA's provision for judicial review of "a determination respecting an application" only in the review of a deportation order in the courts of appeals. 8 U.S.C. 1255a(f)(1) and (4). The court explained that since an alien could later contest the validity of a regulation in the fashion set forth in IRCA—in review of a deportation

[5] While the appeal was pending, litigation proceeded apace in the district court. The court issued Supplemental Orders VI (requiring the preservation of magnetic tapes possibly relating to the Section 265 reports); VII (rejecting petitioners' request to toll the May 4, 1988, deadline for applying for legalization, requiring further publicity of the court's orders, and retaining jurisdiction); VIII (protective order); IX (requiring dissemination of forms permitting aliens to explain any failure to file a timely application for legalization); and X (scheduling order). Pet. App. 128a-139a. On September 27, 1988, the court stated that it would appoint a Special Master to find facts and recommend what relief, if any, would be appropriate for aliens who failed to file a timely application for legalization because of the INS's invalidated "known to the Government" interpretation, and, on October 28, 1988, a Special Master was appointed. *Id.* at 140a-150a. The government challenged the appointment of a Special Master by petitioning for mandamus, but the D.C. Circuit denied the petition. *In re Thornburgh*, 869 F.2d 1503 (1989) (reproduced at Pet. App. 166a-195a). Other disputes continued to percolate, prompting still more orders. These disputes included the INS's alleged noncompliance with prior orders, Pet. App. 151a-157a, fee requests for the Special Masters, *id.* at 158a-165a, and attorney's fee requests, Orders, No. 88-0625 SS (Apr. 4, 1989, July 17, 1989) (ordering interim fee disbursements to petitioners' counsel).

order (after the regulation had been applied)—"it follows that the district court lacked jurisdiction to hear the same claim in a different forum." Pet. App. 16a.

The court also held that the organizational plaintiffs, even if serving as "qualified designated entities" to receive legalization applications (see note 2, *supra*), could not invoke the district court's jurisdiction because to allow such actions would undercut IRCA's jurisdictional scheme and, in particular, its exhaustion-of-remedies requirement. Pet. App. 28a-32a (citing *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)). The court explained that:

> Congress allowed individual aliens, who undoubtedly have the most direct interest in the administration of IRCA, to challenge unfavorable INS rulings only in the deportation context. It would undermine Congress' system of administrative remedies and its plan for limited judicial review of IRCA determinations, if [qualified designated entities] were able to seek declaratory judgments in the district courts without any applicable exhaustion requirement.

Pet. App. 32a.

In an "alternative holding[],"[] the court ruled that even if the district court had jurisdiction, the INS policy at issue in Supplemental Order V was neither final agency action nor ripe for judicial review. Pet. App. 32a-43a. Applying well-established principles governing the timing of review, the court of appeals examined the fitness of the issues for judicial review, and the hardship to the parties of postponing review. *Id.* at 32a-33a (citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). After full consideration of the genesis of INS's "known to the Government" rule, the history of litigation in the district court, and the evidence adduced on INS's actual practices with regard to aliens claiming eligibility under Section 265, the court of appeals concluded that INS had not formulated a position on Section 265 claims that was sufficiently crystallized for judicial review. Pet. App. 38a. The court also found that the district court had not identified any irreparable harm

that would accrue to the organizational plaintiffs, and that even if the individual plaintiffs' cases were considered, those plaintiffs would suffer no irreparable injury because they could pursue their claims through the administrative and judicial process that Congress had provided.[6]

Chief Judge Wald dissented, believing that the district court had properly exercised jurisdiction and that INS's actions were ripe for review. Pet. App. 203a-205a. She contended that IRCA's judicial review provisions governed only review of a particular individual's claim to legalization. Consequently, in Judge Wald's view, the district court's general federal question jurisdiction was available for claims challenging the validity of rules. *Id.* at 48a-74a. Judge Wald also would have found the INS policy at issue in the district court's Supplemental Order V to be final and ripe for judicial review. *Id.* at 75a-84a. Finally, she agreed on the merits with the district court's conclusion that the "known to the Government" eligibility criteria included Section 265 claimants. *Id.* at 85a.[7]

DISCUSSION

The petition for certiorari presents two questions. First, the petition challenges the holding of the court of appeals that the district courts lack jurisdiction to review INS regulations governing legalization under IRCA. Second, the petition claims that the court of appeals erred in applying well-settled timing-of-review principles to the particular agency action at issue in this case.

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[6] In a statement filed on the denial of rehearing, Judge Silberman, joined by Judge D.H. Ginsburg, also noted that such aliens did not even risk exposure to the INS by filing a legalization application (and thus preserving their remedies), because IRCA protects against the disclosure of legalization files for any purposes other than to make a determination on the application or for enforcement of the antifraud provisions of IRCA. Pet. App. 200a-201a. See 8 U.S.C. 1255a(c)(5).

[7] In light of the court's opinion, the district court has stayed the Special Master proceedings that were authorized under Supplemental Orders XI and XII (see note 5, *supra*). Order, No. 88-0625 SS (July 26, 1989).

The first question presented (jurisdiction) raises an issue of general importance on which the circuits are divided. In *Haitian Refugee Center, Inc.* v. *Nelson*, 872 F.2d 1555 (1989), petition for cert. pending, No. 89-1332, the Eleventh Circuit held, in construing the virtually identical jurisdictional provisions applicable to the "Special Agricultural Workers" (SAW) legalization program, that the district courts have jurisdiction to entertain challenges to system-wide "policies and practices" of the INS. The holding below is squarely to the contrary. Because of this conflict, and because of the overall importance of this issue to the legalization programs, we have filed a certiorari petition seeking this Court's review of the Eleventh Circuit's decision. *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332.[8]

On the other hand, the second question presented in the instant petition (ripeness) does not raise an issue of general importance, and there is no claim of a conflict between the decision below and that of another court of appeals. The court of appeals correctly applied the ripeness and finality principles that the Court has explicated in many prior decisions, and this Court's review is not necessary to ensure uniformity, to provide clarification, or to develop the existing law regarding these issues.

Because one of the two alternative grounds for the court of appeals' judgment does not merit this Court's attention, the Court could deny the present petition outright; reversal of the judgment below would not be required even if petitioners prevailed on their jurisdictional arguments (or if the Court granted our petition in No. 89-1332 and affirmed). Nevertheless, we believe that since the Court's ultimate resolution of the jurisdictional issue may affect the proper disposition of the case, the Court should hold the instant petition for disposition in light of *McNary* v. *Haitian Refugee Center, Inc.*

1. Petitioners' principal contention (Pet. 9-24) is that the court of appeals mistakenly held that IRCA precludes challenges in federal district court to legalization regula-

[8] We have provided a copy of our petition to petitioners here.

tions. Contrary to that view, the court of appeals correctly held that Congress did not intend to permit broadside challenges to INS rules, regulations, or policies through the vehicle of an action in district court.

a. Congress carefully structured the legalization programs—both the general program at issue here and the SAW program at issue in *McNary* v. *Haitian Refugee Center, Inc.* to channel all judicial review of INS determinations to the courts of appeals in the review of a deportation order. The statute provides in all-encompassing terms: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1255a (f)(1). In the following paragraphs, the subsection requires the establishment of "a single level of administrative appellate review," and states that "[t]here shall be judicial review of such a denial [of a legalization application] *only* in the judicial review of an order of deportation under Section 1105a of this title." 8 U.S.C. 1255a (f)(3)(A) and (4)(A) (emphasis added). Section 1105a, in turn, requires that a deportation order may be reviewed only in a court of appeals.[9] Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a "determination respecting an application" for legalization status, other than in the court of appeals following the entry of a deportation order.

Although couched as a challenge to a rule, petitioners' complaint in essence sought review of a "determination respecting an application" for legalization—indeed, many such applications. As the court below explained, since a regulation governing eligibility for legalization will affect the outcome of a class of individual applications, "the regulation embodies determinations that will impact, and

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[9] 8 U.S.C. 1105a makes applicable the Hobbs Act, 28 U.S.C. 2341 *et seq.*, as the "sole and exclusive" provision for the review of "final orders of deportation," thereby conferring exclusive jurisdiction on the courts of appeals.

therefore are 'respecting,' future individual applications." Pet. App. 13a. Review of the regulation is therefore barred until the regulation is applied in a particular case, and an alien has sought review following the entry of an order of deportation. Compare *Heckler* v. *Ringer*, 466 U.S. 602 (1984). By virtue of the provision for exclusive review in the courts of appeals, petitioners' action cannot be brought in district court.[10]

Petitioners are mistaken in insisting (Pet. 18) that the court of appeals violated the presumption in favor of judicial review of agency action. Rather, the court simply applied the principle that when Congress limits review to the courts of appeals, it does not intend simultaneously to permit the same actions to be reviewed in district court. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744-745 (1985). Permitting review of rules in the district courts would lead to a "rather peculiar" division of jurisdiction, because the courts of appeals, in reviewing deportation orders, would hear "only the application of the statute in presumably less important individual cases," while district courts would review "the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens." Pet. App. 12a, 15a. Petitioners' construction (Pet. 19-20) of the statute does not explain this anomaly. Nor do petitioners explain why Congress would have so carefully limited judicial review to aliens who have *final* deportation orders, yet have countenanced anticipatory relief for aliens fortunate enough to have a district judge direct the reopening of their legalization applications (as the district court did here). Such a result would frustrate the requirement of

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[10] Thus, neither the grant of general federal question jurisdiction under 28 U.S.C. 1331 nor the provision in the immigration laws giving jurisdiction to the district courts for "all causes, civil and criminal, arising under any of the provisions of this subchapter" can be read to override the more specific limitations set forth in IRCA. 8 U.S.C. 1329. Cf. *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-422 (1965).

exhaustion of administrative remedies (see 8 U.S.C. 1255a(f)(3)), thus depriving the agency of an opportunity to formulate policy, correct its own errors, and determine whether an applicant would, in any event, fail to qualify for legalization.

Other considerations also buttress the decision below. As the court of appeals observed, it "seems inconceivable" that Congress would have closely cabined court of appeals review of INS regulations as applied to particular cases, but would have authorized full-scale Administrative Procedure Act challenges to those same regulations in the district court. *Id.* at 15a-16a. Nor is it plausible that Congress intended district courts to become embroiled in supervising relief for individual aliens who claim to be barred by an invalid INS rule or policy.[11] And, as we explain in our petition for certiorari in *McNary* v. *Haitian Refugee Center* (at 12-17, 20-22), the conclusion that actions like the present one are barred under IRCA is consistent with the decisions of this Court, the legislative history, and the purposes animating the judicial review provisions in IRCA.[12]

Petitioners err in claiming (Pet. 23-24) that the organizational plaintiffs, who are "qualified designated entities" under IRCA, enjoy standing to sue in their own right.[13] "[W]hen a statute provides a detailed mech-

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[11] This case demonstrates that such supervision is a nearly inevitable consequence of district court jurisdiction. Indeed, the district court at one point entertained a motion to hold INS in contempt for denials of legalization issued by the administrative appeals unit to individual applicants. See Pet. App. 151a-156a.

[12] Petitioners attempt to discredit (Pet. 10 n.12) the holding below by suggesting that it would permit INS to restrict legalization to "white (or male, or European) aliens" and be free from all district court review. That suggestion—far removed from the present facts—is of no avail. Congress surely did not fashion its chosen framework for judicial review with such bizarre hypotheticals in mind, and the ability to imagine them provides no reason to depart from Congress's evident intention to cut off all district court review —an intent that is plain from the language and structure of IRCA.

[13] Petitioners appear to have abandoned any claim that organizations that simply advise aliens, but are not "qualified designated

anism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). Although there is ordinarily a presumption favoring judicial review, it is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351 (quoting *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970)). Those principles are applicable here. Although Congress provided for "qualified designated entities" in order to encourage aliens to come forward and apply for legalization, it did not designate them as litigation agents for aliens. To allow such groups to sue would permit circumvention of the contemplated layer of administrative review within INS, thus preventing INS from fleshing out its regulations as applied to particular cases. Moreover, IRCA was not designed for the benefit of those groups, and it affords them no special protection. Their legal claims essentially duplicate the claims of legalization applicants. Under these circumstances, the court of appeals correctly held that Congress did not authorize the organizational plaintiffs to sue.

b. We agree with petitioners (Pet. 10-13) that the decision below conflicts with *Haitian Refugee Center, Inc.* v. *Nelson*, *supra*. In that case, as here, organizational plaintiffs (including a "qualified designated entity") and individual SAW program applicants challenged alleged system-wide INS procedures for adjudicating applications for SAW status. The plaintiffs urged that the so-called "policy and practice" exception to 8 U.S.C. 1105a, recognized in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846 (1985), and *Haitian*

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entities," can properly sue under IRCA. Moreover, the questions whether *individual* aliens may sue, and whether the organizations here enjoy standing to assert their interests, are not properly presented in this Court because the district court never ruled on those issues (see Pet. App. 109a n.9).

Refugee Center (HRC) v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), should be extended to apply to IRCA as well. Endorsing that approach, the Eleventh Circuit held, 872 F.2d at 1560, that such a challenge could be brought in federal district court notwithstanding the limited provisions for judicial review set forth in 8 U.S.C. 1160(e) (the counterpart in the SAW program to 8 U.S.C. 1255a(f)).

As petitioners indicate (Pet. 12), the Eleventh Circuit's holding is "diametrically opposed" to the holding of the court of appeals here. In each case, the critical issue was whether the general federal question jurisdiction of the district courts was available for a challenge to "rules" or "policies," despite the detailed provisions governing judicial review in IRCA. The language of the applicable IRCA provisions is virtually identical. Compare 8 U.S.C. 1255a(f) (general legalization program) with 8 U.S.C. 1160(e) (SAW program). Although the decision below involved an APA challenge to a rule promulgated by the INS, and the plaintiffs in *Haitian Refugee Center, Inc.* v. *Nelson*, *supra*, challenged policies that were alleged to be tantamount to rules, we agree with petitioners that the cases are not distinguishable on that basis.

c. We do not agree, however, with petitioners' assertion (Pet. 13-15) that the decision below implicitly conflicts with this Court's decision in *Jean* v. *Nelson*, 472 U.S. 846 (1985). In *Jean*, the court of appeals had upheld the district court's exercise of jurisdiction under the "policy and practice" exception to 8 U.S.C. 1105a, rejecting the government's claim that such an exception was incompatible with the statute. 727 F.2d at 980 & n.32. This Court granted review on the aliens' petition, and affirmed without consideration or discussion of the jurisdictional issue.[14]

[14] The question presented by the petition in *Jean* was whether unadmitted aliens could invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause. This Court, in affirming, did not reach that question because it found that nonconstitutional grounds for decision should be considered further on remand. 472 U.S. at 853-857.

Petitioners err in contending (Pet. 15) that by "its ultimate conclusion" the Court in *Jean* "clearly" agreed with the Eleventh Circuit's jurisdictional holding; such an inference would read far too much into the Court's silence. The issue of jurisdiction was not presented in the aliens' petition for certiorari, and the government did not cross-petition. Moreover, the government did not brief the jurisdictional issue, and the Court's opinion did not advert to it.[15]

In any event, the issue here is not whether there is a "policy and practice" exception to 8 U.S.C. 1105a. This case concerns the specific jurisdictional language contained in IRCA. In IRCA, Congress employed language even broader than that in Section 1105a, expressly limiting judicial review of all claims on "a determination respecting an application" to petitions for review of an order of deportation. That language incorporates the judicial review apparatus applicable to deportation cases, but goes farther by adding an explicit prohibition on any other form of judicial review. Consequently, if there had been any doubt about the result under Section 1105a standing by itself, Congress removed it. As the court below recognized, "whatever the proper interpretation of [Section 1105a] as it relates to 'final orders of deportation,' IRCA's judicial review provisions, although employing the [Section 1105a] machinery, have a broader preclusive effect." Pet. App. 25a.[16]

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[15] While we recognize that courts have an independent obligation to examine such jurisdictional issues, compare *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 607-608 (1990), the circumstances of the Court's resolution in *Jean* v. *Nelson* cannot be read as a blanket endorsement of the much-disputed jurisdictional theory espoused by the court of appeals. In our petition for certiorari in *McNary* v. *Haitian Refugee Center, Inc.* (at 22-25), we describe our reasons for disagreeing with the theory of *Jean*, and the prior court of appeals decision on which it rests, *HRC* v. *Smith*.

[16] For that reason, the cases cited by petitioners as allowing review outside the scope of Section 1105a (Pet. 16), and this Court's cases construing Section 1105a (Pet. 17 & n.19), are not helpful to them.

2. Petitioners also challenge (Pet. 25-30) the alternative holding of the court of appeals—that the asserted policy of INS regarding nonimmigrants who had failed to file a required report under Section 265 was neither final nor ripe for purposes of judicial review. That holding, which simply applied accepted timing-of-review principles to the district court's Supplemental Order V, was correct and does not warrant the attention of this Court. Indeed, petitioners acknowledge (Pet. 25) that their ripeness challenge depends on showing that "[t]he majority's position * * * is based upon glaring misconceptions about the facts and the procedural history of the case." The convoluted proceedings in the district court and the particular details attending the evolution of INS's "known to the Government" rule were painstakingly examined by the court of appeals, and its factbound analysis surely does not merit this Court's review. Likewise, petitioners' claim (*ibid.*) that the court below "distorted" finality principles simply quarrels with the application of well-settled law to the particular agency action under review.

a. The underpinnings and proper application of the ripeness doctrine were explained in *Abbott Laboratories* v. *Gardner*:

> [I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. at 148-149. The court of appeals properly applied those considerations here.

After the district court invalidated INS's interpretation of the phrase "known to the Government" on the basis that the phrase did not mean "known to the INS,"

and INS did not appeal from that ruling, INS had no articulated policy regarding Section 265 claims. Indeed, even the district court failed to focus on whether, under its ruling, the *absence* of a required filing with the government could cause the government to have knowledge of an alien's unlawful status. In its first supplemental order, the court stated that an alien seeking to qualify under the "known to the Government" provision had to show that prior to January 1, 1982, "*documentation* existed in one or more government agencies," which, taken as a whole, established the alien's unlawful status. Pet. App. 123a (emphasis added). The court gave no hint that the *absence* of documentation might yield the same result. In Supplemental Order V, however, the court ruled that the absence from INS's files of a required filing under former Section 265 could also satisfy the "known to the Government" requirement. Prior to that ruling, INS had expressed no definitive view on the matter.[17]

The court of appeals rejected petitioners' arguments that, on the basis of a few denials recommended by certain Legalization Offices on particular applications, INS had developed a "final" policy on the Section 265 issue. Pet. App. 34a. The court pointed out that such recommendations were inherently subject to further ac-

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[17] Although INS's original rule could be read to foreclose nearly all aliens from claiming under a Section 265 theory, that rule was never interpreted or applied by INS's administrative appeals authority. Moreover, the original rule was not informed by the principles later articulated by the district court as underlying the "known to the Government" provision. The district court found that the provision was justified as an evidentiary rule (to cut off fraudulent claims by a nonimmigrant that he had violated the terms of his visa prior to 1982). Pet. App. 117a. Because INS did not appeal from the district court's order interpreting the "known to the Government" provision, there was ample cause to believe that INS would rethink its entire approach to the provision, including its application to Section 265 claims.

tion, and thus were not final. *Ibid.* (citing *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241 (1980)).[18]

The court also found that the alleged INS policy underlying the Section 265 claims was not ripe for review. The Section 265 question involved a complex mixture of technical issues of fact regarding INS's record-keeping policies and issues of law regarding the circumstances under which an alien's failure to file a report would render him in an unlawful status that was known to the government. Indeed, the court below held an evidentiary hearing to learn about INS's record-keeping practices. Congress had not "directly addressed the precise question" of the status of Section 265 aliens; hence, resolution of the question was committed to the agency, whose judgment must be upheld if it is a "reasonable interpretation" of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). With those principles in mind, the court found "compelling reasons for postponing judicial intervention" because INS had not definitively resolved ambiguities surrounding application of the "known to the Government" standard to aliens who failed to make a required filing under Section 265. Pet. App. 42a.[19] That holding fully accords with principles routinely applied in the lower courts in determining whether an administra-

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[18] In addition, the court noted that after the district court had decided the only claim in petitioners' complaint—that "Government" did not mean solely the INS—"the court's retention of jurisdiction and continuing 'supervision' of INS's administration of the program was not an appropriate exercise of judicial power vis-a-vis the government." Pet. App. 35a. The court of appeals pointed out that the district court "did not thereby gain jurisdiction to decide whatever new variations could be presented on the 'known to the Government' theme as if it were the administrator of the program." *Id.* at 36a.

[19] In an effort to refute the court's reading of the record, petitioners rely (Pet. 26-27) on the contents of communications by INS that, they claim, establish that INS had a definitive policy. But those materials were not authoritative, and INS had not issued a regulation or rendered a decision on a Section 265 claim through its administrative appeals authority.

tive policy in the process of being developed is "fit" for review.[20]

Petitioners also failed to establish any hardship that would have justified ignoring the inchoate status of INS's policy. As the court of appeals noted, the district court never finally resolved whether the individual plaintiffs had standing, and no class was ever certified. Thus, claims of hardship to the individual applicants were not properly presented. In any event, the "hardship" faced by applicants was the prospect of applying for legalization, with a likelihood of denial, and of pursuing judicial review (in deportation proceedings) if their claims were in fact rejected. That is not sufficient. Pet. App. 42a-43a. If the "burden" of paying a filing fee and pursuing appropriate channels of review were adequate showings of hardship, few claims to an immediate ruling would fail. Compare *Heckler* v. *Ringer*, 466 U.S. at 625-626 (claimant cannot obtain advance ruling on whether surgery is reimbursable under the Medicare Act, even if the surgery cannot be obtained without the assurance of payment).

Nor was the "perplexing dilemma" (Pet. 30) faced by qualified designated entities"—whether or not to advise aliens to apply for legalization—an adequate allegation of hardship. No doubt many organizations and individuals would benefit from clarification of an agency's view of the law in order to give better advice to others.

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[20] See *Natural Resources Defense Council, Inc.* v. *Thomas*, 845 F.2d 1088, 1092-1093 (D.C. Cir. 1988) (claim not ripe because agency had no chance to conduct a proper "rulemaking"); *Cablevision Systems Development Co.* v. *Motion Picture Ass'n*, 836 F.2d 599, 614-615 (D.C. Cir.) (claim not ripe because rulemaking had not addressed disputed issue and no final agency interpretation was made, even though agency's general counsel had issued an interpretation), cert. denied, 108 S. Ct. 2901 (1988); *Action Alliance of Senior Citizens* v. *Heckler*, 789 F.2d 931, 941 (D.C. Cir. 1986) (claim not ripe when court would have to anticipate how the agency might exercise discretion in applying a regulatory standard to particular facts). See also 5 J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 48.01, at 48-3 to 48-6 (1988 & Supp. 1989) (collecting cases).

Such claims of confusion about the state of the law are not "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories* v. *Gardner*, 387 U.S. at 152. Moreover, "[a] claimed hardship that results 'not from delay in *enforcement* of an established standard, but from delay in *establishment* of a standard' is generally not a reason for prompt judicial action." Pet. App. 43a (quoting *Public Citizen Health Research Group* v. *Commissioner*, 740 F.2d 21, 31 (D.C. Cir. 1984)). The organizational plaintiffs' interest in immediate clarification of the application of INS's rules did not furnish an adequate reason to deprive the agency of an opportunity to formulate its policy in a considered fashion.

b. Thus, the alternative (ripeness) ground of the court of appeals' judgment does not merit review here.[21] We believe, however, that the instant petition should be held pending this Court's disposition of *McNary* v. *Haitian Refugee Center, Inc.*, *supra*. If the Court grants review in *McNary* and affirms the judgment in that case, it may wish to grant the petition here, vacate the judgment, and remand to the court of appeals for further consideration. Although the court of appeals reached its ripeness holding based on independent and well-settled principles, the appropriateness of outright dismissal (as opposed to some limited retention of jurisdiction by the district court) might be affected if this Court were to hold that Congress intended district courts to entertain rule-based challenges under IRCA. On the other hand, if the Court grants review in *McNary* and reverses the judgment, holding that IRCA precludes the exercise of jurisdiction by the district courts, the petition in this case should be denied.

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[21] The Court should not grant certiorari here to review the jurisdictional issue alone, because even if petitioners were to prevail on that issue, the ripeness holding of the court below would be sufficient to sustain its judgment. In addition, the petition in this case fails to present several standing issues (see note 13, *supra*) that are integrally bound up with the jurisdictional question. Those issues are properly presented in *McNary*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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